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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. ~~211.~~ 8

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED MARCH 29, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 211.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

there had their only place of business in the city of New York aforesaid, where their stock in trade then and there was and since has been kept, and when their goods on being sold then and there were and since have been shipped directly to purchasers in the State of Maryland, and other aarts of the United States, contrary to the form of the act of Assembly in such cases made and provided, and against the peace, government, and dignity of the State.

2 *Second Count.*

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said George W. Corson, a citizen and resident of the city of New York, in the State of New York, on the twenty-eighth day of October, in the year of our Lord eighteen hundred and eighty, at the city of Baltimore aforesaid, did sell by sample to one Cornelius D. Kenny, certain goods and chattels, wares, and merchandize, to wit, thirty packages of tea, then and there the property of a certain partnership firm, to wit, Rosewell, Skeel and Company, the members of which said partnership firm were then and there residents and citizens of the city of New York, in the State of New York, which said packages of tea were then and there stored in the warehouse of the said Rosewell, Skeel and Company, in the city of New York aforesaid, without first taking out a license therefor; neither he, the said George W. Corson, nor the said Rosewell, Skeel and Company, having any store or place of business, temporary or permanent, or any stock in trade, other than samples of tea, in the said State of Maryland, and neither he, the said George W. Corson, nor the said Rosewell, Skeel & Company, being then and there the growers, makers, or manufacturers of said thirty packages of tea, he, the said George W. Corson, being then and there the agent of the said Rosewell, Skeel & Company, and having authority from them then and there to make such sale as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that neither the said George W. Corson, nor the said Rosewell, Skeel and Company, intended then and there to keep or have any stock in the said city of Baltimore other than samples as aforesaid, or to be engaged in any trade or business in said city of Baltimore, or in the State of Maryland, otherwise than in selling by sample as aforesaid, and that neither of them has any principal season of sale in the said city of Baltimore, or State of Maryland, but that the said Rosewell, Skeel and Company then and there had, and since have had, their only place of business in the city of New York aforesaid, where their stock in trade then and there was, and since has been kept, and where their goods on being sold, then and there were, and since have been, shipped directly to purchasers in the State of Maryland, and other parts of the United States, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the State.

CHARLES G. KERR,
The State's Attorney for the City of Baltimore.

Which said indictment — thus endorsed, to wit: "True bill. Otis Keilholtz, foreman," was duly returned by the grand jury to the court.

On the 22nd March, 1881, the following demurrer to the indictment was filed, to wit:

Demurrer.

In the Criminal Court of Baltimore.

STATE *vs.* GEORGE W. CORSON.

3 And the said George W. Corson, by S. T. Wallis and H. D. Loney, his attorneys, saith: That the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient indictment in this behalf, the said George W. Corson prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

S. T. WALLIS,
H. D. LONEY,
Att'ys for George W. Corson.

25 March, 1881. Issue joined on demurrer; same day, demurrer overruled; right to plead overwaived.

Same day, judgment that George W. Corson, the traverser, pay to the State of Maryland a fine of ($20.00) twenty dollars, and also to said State for the use of such persons as are entitled to and ought to receive the same, the sum of seven dollars and ninety-eight cents, being the costs accrued upon the prosecution aforesaid.

Petition for Writ of Error and Assignment of Errors.

In the Criminal Court of Baltimore.

(30th March, 1881, the following petition was filed.)

STATE *vs.* GEORGE W. CORSON.

To the Hon. Campbell W. Pinkney, judge, &c.:

The petition of George W. Corson, the traverser, respectfully represents: That to the indictment found against him, he filed a general demurrer, which the court here has overruled, and has entered final judgment against him, by reason whereof he feels aggrieved, and prays that the record may be removed by way of writ of error, to the court of appeals, that the errors therein may be corrected, and assigns the following as errors therein:

1. For that the court, in overruling said demurrer, held and determined that sections 41 to 56, inclusive, of article XII of the Revised Code of Maryland, as amended in chapter 349, of the Acts of

1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held for the said State, at the city of Annapolis, on the first Monday of April, it being the fourth day of said month, A. D. one thousand eight hundred and eighty-one, and of the Independence of the United States of America the one hundred and fifth—present: The honorable James L. Bartol, chief judge, and associate judges, seven: Levin T. H. Irving, John M. Robinson, Richard Grason, Richard H. Alvey, Oliver Miller, John Ritchie, Daniel R. Magruder—among other were the following proceedings, to wit:

Indictment. Filed 22 *M'ch*, 1881.

In the Criminal Court of Baltimore. January Term, 1881.

THE STATE OF MARYLAND *vs.* GEORGE W. CORSON.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

The jurors of the State of Maryland, for the body of the city of Baltimore, do on their oath present that George W. Corson, a citizen and resident of the city of New York, in the State of New York, yeoman, on the twenty-eighth day of October, in the year of our Lord eighteen hundred and eighty, at the city of Baltimore aforesaid, did offer to sell by sample to one Cornelius D. Kenney certain goods and chattels, wares and merchandize, to wit, thirty packages of tea, then and there the property of a certain partnership firm, to wit, Rosewell, Skeel and Company, the members of which partnership firm were then and there residents and citizens of the city of New York, in the State of New York, which said packages of tea were then and there stored in the warehouse of the said Rosewell, Skeel and Company, in the city of New York aforesaid, without first taking out a license therefor; neither he, the said George W. Corson, nor the said Rosewell, Skeel and Company, having any store or place of business, temporary or permanent, or any stock it trade other than samples of tea, in the said State of Maryland; and neither he, the said George W. Corson, nor the said Rosewell, Skeel and Company, being then and there the growers, makers, or manufacturers of said thirty packages of tea, he, the said George W. Corson, being then and there the agent of the said Rosewell, Skeel and Company, and having authority from them, then and there to make such offer for sale as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present that neither he, the said George W. Corson, nor the said Rosewell, Skeel and Company, expected or intended then and there to keep or have any stock in the said city of Baltimore other than samples as aforesaid, or to be engaged in any trade or business in said city of Baltimore, or in the State of Maryland, otherwise than in selling by samples as aforesaid, and that neither of them has any principal season of sale in the city of Baltimore, or State of Maryland, but that the said Rosewell, Skeel and Company then and

there had their only place of business in the city of New York aforesaid, where their stock in trade then and there was and since has been kept, and when their goods on being sold then and there were and since have been shipped directly to purchasers in the State of Maryland, and other aarts of the United States, contrary to the form of the act of Assembly in such cases made and provided, and against the peace, government, and dignity of the State.

2 *Second Count.*

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said George W. Corson, a citizen and resident of the city of New York, in the State of New York, on the twenty-eighth day of October, in the year of our Lord eighteen hundred and eighty, at the city of Baltimore aforesaid, did sell by sample to one Cornelius D. Kenny, certain goods and chattels, wares, and merchandize, to wit, thirty packages of tea, then and there the property of a certain partnership firm, to wit, Rosewell, Skeel and Company, the members of which said partnership firm were then and there residents and citizens of the city of New York, in the State of New York, which said packages of tea were then and there stored in the warehouse of the said Rosewell, Skeel and Company, in the city of New York aforesaid, without first taking out a license therefor; neither he, the said George W. Corson, nor the said Rosewell, Skeel and Company, having any store or place of business, temporary or permanent, or any stock in trade, other than samples of tea, in the said State of Maryland, and neither he, the said George W. Corson, nor the said Rosewell, Skeel & Company, being then and there the growers, makers, or manufacturers of said thirty packages of tea, he, the said George W. Corson, being then and there the agent of the said Rosewell, Skeel & Company, and having authority from them then and there to make such sale as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that neither the said George W. Corson, nor the said Rosewell, Skeel and Company, intended then and there to keep or have any stock in the said city of Baltimore other than samples as aforesaid, or to be engaged in any trade or business in said city of Baltimore, or in the State of Maryland, otherwise than in selling by sample as aforesaid, and that neither of them has any principal season of sale in the said city of Baltimore, or State of Maryland, but that the said Rosewell, Skeel and Company then and there had, and since have had, their only place of business in the city of New York aforesaid, where their stock in trade then and there was, and since has been kept, and where their goods on being sold, then and there were, and since have been, shipped directly to purchasers in the State of Maryland, and other parts of the United States, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the State.

CHARLES G. KERR,
The State's Attorney for the City of Baltimore.

Which said indictment — thus endorsed, to wit: "True bill. Otis Keilholtz, foreman," was duly returned by the grand jury to the court.

On the 22nd March, 1881, the following demurrer to the indictment was filed, to wit:

Demurrer.

In the Criminal Court of Baltimore.

STATE *vs.* GEORGE W. CORSON.

3 And the said George W. Corson, by S. T. Wallis and H. D. Loney, his attorneys, saith: That the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient indictment in this behalf, the said George W. Corson prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

S. T. WALLIS,
H. D. LONEY,
Att'ys for George W. Corson.

25 March, 1881. Issue joined on demurrer; same day, demurrer overruled; right to plead overwaived.

Same day, judgment that George W. Corson, the traverser, pay to the State of Maryland a fine of ($20.00) twenty dollars, and also to said State for the use of such persons as are entitled to and ought to receive the same, the sum of seven dollars and ninety-eight cents, being the costs accrued upon the prosecution aforesaid.

Petition for Writ of Error and Assignment of Errors.

In the Criminal Court of Baltimore.

(30th March, 1881, the following petition was filed.)

STATE *vs.* GEORGE W. CORSON.

To the Hon. Campbell W. Pinkney, judge, &c.:

The petition of George W. Corson, the traverser, respectfully represents: That to the indictment found against him, he filed a general demurrer, which the court here has overruled, and has entered final judgment against him, by reason whereof he feels aggrieved, and prays that the record may be removed by way of writ of error, to the court of appeals, that the errors therein may be corrected, and assigns the following as errors therein:

1. For that the court, in overruling said demurrer, held and determined that sections 41 to 56, inclusive, of article XII of the Revised Code of Maryland, as amended in chapter 349, of the Acts of

Assembly of Maryland, passed in 1880, are applicable to the facts set forth in the indictment, and that the traverser, upon said facts, was bound to take out, and ought to have taken out a license thereunder, and violated said sections of said Code, by not taking out said license.

2. For that the court held and determined that said sections of article XII of the Revised Code of Maryland, amended as aforesaid, being applicable to the facts found in the indictment, were not in violation of subsection I of section II of article IV of the Constitution of the United States, whereby "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

3. For that the court held and determined that said sections 41 to 56, of article XII of the Revised Code of Maryland, amended as aforesaid, being applicable to the facts found in the indictment, were not in violation of subsection 4, of section 8, of article I, of the Constitution of the United States, whereby it is ordained, that "the Congress shall have power to regulate commerce * * * among the several States."

4 4. For that court held and determined, in overruling said demurrer, that a citizen and resident of the State of New York, carrying on business in the said State, having his stock in trade in said State, having no store or place of business, temporary or permanent, in the State of Maryland, and not intending or expecting to have any stock in trade in said last-named State, or to be engaged in any trade or business in said State, otherwise than in selling by sample, and having no principal season of sale in said State, but whose only place of business was in the city of New York, in the State of New York aforesaid, where his stock in trade is kept, and whence his goods, on being sold, are shipped directly to purchasers in the State of Maryland, and other States of the Union, said citizen and resident of New York, not being the grower, maker, or manufacturer of the article or articles sold by him, has no right or authority to sell by sample in Maryland, goods so kept by him in said State of New York, without first procuring a license, as provided in the 12th article of the Revised Code of Maryland, in sections 41 to 56, amended as aforesaid.

5. For that the court held and determined, in overruling said demurrer, that by requiring a license to be taken out by a non-resident of the State of Maryland, before he shall be permitted to sell, or offer for sale, goods not in the State of Maryland, but in other of the States of the United States, the State of Maryland is authorized and empowered to impose taxation upon goods out of the State of Maryland, and in other of the States of the United States.

6. For that the court held and determined, by overruling said demurrer, that the State of Maryland is authorized and empowered to require a non-resident of the State of Maryland to procure a license, that he may offer to sell or sell goods not in the State of Maryland, the amount of said license being measured by the stock in trade generally kept on hand by him in the principal season of sale, in the State in which he is or may be resident, and not being or to be in Maryland, thereby imposing on said non-resident, and requiring him

to pay a tax on goods not within the jurisdiction of this State, and not answerable to its laws, nor under the protection of the same.

7. For that the said court, in overruling said demurrer, did in effect rule and determine, that a citizen of New York, may not perronally, or by his agent, lawfully make a contract in Maryland for the sale of goods, then being in New York, without a license therefor from said State of Maryland.

8. For that the said court, in overruling said demurrer, did in effect rule and determine, that the State of Maryland may lawfully impose a tax on goods imported from the State of New York into the State of Maryland, notwithstanding the prohibition of subsection 5, of section 9 of article I of the Constitution of the United States.

9. For that the court, in overruling said demurrer, did in effect rule and determine that said sections 41 to 56, of article XII of the Revised Code of Maryland, amended as aforesaid, are applicable to cases other than traders having or intending to have a place of business and a stock of goods for sale in the State of Maryland.

S. T. WALLIS,
H. D. LONEY,
Attorneys for Traverser.

Same day, ordered by court, that the record of proceedings be removed in accordance with the petition; and the same is hereby transmitted to the court of appeals.

5 STATE OF MARYLAND, *City of Baltimore,* } *to wit:*

I hereby certify, that the aforegoing is a true transcript of the record and proceedings in the aforegoing cause, taken and copied from the record of proceedings of the criminal court of Baltimore.

In testimony whereof I hereto set my hand and affix the seal of said court, this 31st day of March, A. D. 1881.

[Seal's place.]

JOHN S. BULLOCK,
Clerk Criminal Court of Baltimore.

6 In the Court of Appeals of Maryland. April Term, 1881.

GEORGE W. CORSON *vs.* THE STATE OF MARYLAND.

Chief Judge BARTOL delivered the opinion of the court:

This case comes up on a writ of error from the criminal court of Baltimore. The plaintiff in error was indicted for selling by sample to one Kenney, in the city of Baltimore, thirty packages of tea without first taking out a license therefor as required by the code, as amended by the act of 1880, ch. 349.

It is alleged in the indictment that the plaintiff in error is a citizen and resident of the city and State of New York; that the thirty packages of tea so sold were the property of the firm of Rosewell, Skeel and Company, residents and citizens of the city and
7 State of New York, and were stored in the warehouse of said firm in the city of New York; that neither he, the plaintiff

in error, nor said Rosewell, Skeel and Company, had any store or place of business, temporary or permanent, or any stock in trade other than samples of tea in the State of Maryland, and neither the plaintiff in error nor the said Rosewell, Skeel & Co., being the growers, makers, or manufacturers of said thirty packages of tea.

The indictment further charged that neither the plaintiff in error nor the said Rosewell, Skeel & Co. intended to keep any stock in the city of Baltimore, or to be engaged in any trade or business in said city or State otherwise than by selling by samples as aforesaid; that neither had any principal season of sale in said city or State, but that Rosewell, Skeel & Co. had their only place of business in the city of New York, where their stock in trade was and has since been kept, and where their goods, on being sold, were then and since have been shipped directly to purchasers in the State of Maryland and other parts of the United States.

8 The plaintiff in error demurred to the indictment; his demurrer was overruled, and having waived his right to plead over, judgment was entered against him. Whereupon he applied to have the record removed to this court, as upon writ of error.

The subject of licenses to traders and others is regulated by art. 56 of the Code. The 37th, 38th, 39th, and 40th sections of that article related only to non-residents of the State, and prescribed the license required to entitle them "to sell, offer for sale, or expose to sale within the limits of the city of Baltimore, any good, wares, or merchandise whatsoever" (with certain specified exceptions) "either by sample, card, or other specimen, or by written or printed trade list or catalogue." Those sections regulated the cost of such license, required a different and a larger amount to be paid therefor than was required of residents of the State, and prescribed a penalty for their violation. They came before the Supreme Court of the

9 United States for examination in Ward *vs.* Maryland, 12 Wall., 418, and were adjudged to be unconstitutional and void, because they imposed a discriminating tax upon persons not permanent residents of the State different from that imposed upon citizens of the State, and were therefore in violation of art. 4, sec. 2 of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Since that decision the sections mentioned have not been attempted to be enforced, and although they have not been expressly repealed they are properly regarded as no longer valid or operative.

By the act of 1880, ch. 349, certain amendments have been made to the Code, which we shall proceed to notice. Sections 41 to 57, inclusive, as originally enacted, related only to resident traders. By the act of 1880, sections 41, 42, and 56 were repealed, and certain sections, numbered in the same way, were enacted in lieu

10 thereof, which by their terms, embrace all persons, whether residents or non-residents of the State, while sections 43 to 55, inclusive, remain unchanged.

The provisions of the Code as thus amended and now in force are as follows:

Sec. 41 provides that "no person or corporation other than the grower, maker, or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this State, without first obtaining a license in the manner herein prescribed." (Then follows certain exceptions not necessary to be here enumerated.)

Sec. 42 provides, "when any person, body politic or corporate, shall propose to sell or barter or dispose of or offer for sale anything mentioned in the preceding section, except spirituous or fermented liquors, he shall apply to the clerk of the circuit court of the
11 county in which he proposes to carry on such selling or bartering, or disposing of goods, wares, chattels, or merchandise, or if he proposes to carry on such selling or bartering or disposing of goods, wares, chattels, or merchandise in the city of Baltimore, to the clerk of the court of common pleas, for a license therefor." (Then follow certain provisions not necessary to be here stated.)

Sec. 43 provides, "upon such application the applicant shall state to the clerk, on oath, * * * the amount of said applicant's stock of goods, wares, and merchandise generally kept on hand by him, or the concern in which he is engaged, at the principal season of sale; or if said applicant shall not have previously engaged in tuch trade or business, the amount of such stock he expects to keep as aforesaid."

Secs. 44 to 55, inclusive, prescribe the rate or sum to be paid for such license, graduated according to the sworn statement of the applicant's stock in trade, at the principal season of sale; ranging
12 from $15 if the stock exceed $1,000 and is not more than $1,500, to $150 if the stock exceed $40,000.

Sec. 56, as amended, provides, "if the applicant for a license lives out of the county or city wherein he proposes to carry on such business of selling, bartering, or otherwise disposing of, or offering for sale such goods, chattels, wares, and merchandise; or if the applicant lives out of the State, or is unable to apply in person by reason of sickness or bodily infirmity, his or her agent may apply for license and make the affidavit as hereinbefore provided."

The foregoing statement of the provisions of the Code, as amended by the act of 1880, is sufficient to show that the plaintiff in error clearly falls within their operation. He is charged in the indictment with selling in the city of Baltimore, by sample, thirty packages of tea, without first taking out license therefor. The language of the Code applies alike to residents and non-residents, and applies to all sales whether made by sample or otherwise.

13 It remains to be seen whether these statutory provisions are in any respect in violation of the Constitution of the United States.

It is clear that they are free from the objection which was declared in Ward's case to be fatal to the validity of the sections then under consideration, as these do not impose a discriminating tax upon

non-residents; on the contrary, the same rate of license is required of citizens of the State as of non-residents. For this reason it seems to us they are not in violation of art. 4, sec. 2, of the Constitution of the United States. Woodruff *vs.* Parkam, 8 Wall., 123; Hinson *vs.* Iott, *id.*, 148; Machine Co. *vs.* Gage, 100 U. S., 676. Nor are they in our opinion, in conflict with Art. 1, Sec. 8, of the constitution, which declares that "Congress shall have power to regulate commerce among the several States."

The statute under consideration is not in any sense a re-
14 striction upon commerce, "it does not purport to be a tax on the transit of goods through the State for commercial purposes"—it merely "imposes a tax by way of license upon a particular business or trade carried on entirely within the limits of the State."

"The power of a State to impose a tax, in the way of a license, upon all pursuits and occupations within its limits has never been seriously questioned." Nathan *vs.* Louisiana, 8 How., 80, 82. License Tax Cases, 5 Wall., 472. Welton *vs.* Missouri, 91 U. S., 278.

We have been unable to perceive the force of the objections to the validity of the provisions of the Code based upon their supposed conflict with the articles and sections of the Constitution to which we have referred.

It has been argued on the part of the plaintiff in error that the effect of the Code is to impose a tax upon property situated out of the limits of the State and not within its jurisdiction, which is not within the constitutional power of the Legislature to impose.
15 In our judgment this is not the true construction or effect of the law.

It is not a tax upon the goods constituting the capital stock of the person obtaining the license; but the Legislature in regulating the rate or cost of the license has adopted as a standard the amount or value of the stock in trade of the dealer. Domestic traders are required to pay the same rate of license. This is imposed on them as a tax upon their occupation or business as vendors of goods; it is not, and has never been, considered as a tax upon their stock of goods as property; for that is taxed under our general laws as property within the State. So where a person not residing within the State, who wishes to carry on the same business within its limits, is required to pay the same rate of license regulated by the same standard, it cannot be successfully maintained that the license is a tax upon his stock of merchandise, sit-
16 uated in the State in which he resides.

Being of opinion that the provisions of the Code, as amended by the act of 1880, are constitutional and valid, the judgment of the criminal court will be affirmed.

Judgment affirmed.

Judgment was affirmed in this case on the 22nd of July, 1881, and execution awarded for the sum of $20 and $7.98 costs in the criminal court of Baltimore, and $60.60 costs in the court of appeals.

To the Honorable James L. Bartol, chief judge of the court of appeals of Maryland:

The petition of George W. Corson, a citizen of the State of New York, respectfully represents:

That a final judgment has been rendered by the court of
17 appeals of Maryland, in a suit therein pending, wherein the said George W. Corson is defendant, and The State of Maryland is plaintiff.

That the said court of appeals is the highest court of law in the State of Maryland in which a decision in the said suit could be had.

That there is drawn in question in said suit the validity of a statute of the State of Maryland, on the ground of its being repugnant to the Constitution of the United States.

That the said judgment is in favor of the validity of the said statute and against the right and immunity specially set up and claimed by this petitioner under said Constitution, as appear on the face of the record, accompanying this petition.

18 Wherefore, to the end that the said judgment of the court of appeals of Maryland may be re-examined and reversed, or affirmed in the Supreme Court of the United States upon a writ of error, your petitioner prays that a citation may be issued in the same manner as if the said judgment had been rendered in a circuit court of the United States.

S. T. WALLIS,
H. D. LONEY,
For Plaintiff in Error, George W. Corson.

The above petition is granted, and a writ of error is allowed as therein prayed.

March 13th, 1883.

JAS. L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

19 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, between the State of Maryland, plaintiff, and George W. Corson, defendant, wherein was drawn in question in said suit the validity of a statute of the State of Maryland, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity of the said statute and against the right and immunity specially set up and claimed under said Constitution, a manifest error hath happened to the great damage of the said George W. Corson,
20 as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,

if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

21 [Seal of the U. S. circuit court, Maryland.]

JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the District of Maryland.

Allowed by—

The Hon. JAMES L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

Know all men by these presents, that we, George W. Corson, of the city of New York and State of New York, and John D. Lipscomb, of the city of Baltimore and State of Maryland, are held and firmly bound unto the State of Maryland in the just and full sum of five hundred dollars, to be paid unto the said State of

22 Maryland, its certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this twelfth day of March, in the year eighteen hundred and eighty-three.

Whereas, lately in the court of appeals of Maryland, in a suit depending in said court between the State of Maryland and the said George W. Corson, defendant, and carried on appeal to said court of appeals from the criminal court of Baltimore city, judgment was rendered against said George W. Corson, and the said George W. Corson having obtained a writ of error, and filed a copy thereof in the office of the clerk of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Maryland, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washing-

23 ton on the second Monday of October next:

Now, the condition of the above obligation is such that if the said George W. Corson shall prosecute said writ to effect, and shall answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

GEO. W. CORSON. [SEAL.]
JNO. D. LIPSCOMB. [SEAL.]

Test: H. D. LONEY.

STATE OF MARYLAND, *City of Baltimore,* } *Sct:*

I hereby certify that on this twelfth day of March, A. D. 1883, before the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared John D. Lipscomb, one of the obligors in the above bond, and made oath in due form of law that he is worth more than five hundred
24 dollars, the amount of the penalty of said bond, after the payment of his just debts and liabilities.

GEORGE McCAFFRAY, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *Sct:*

I hereby certify that George McCaffray, esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city, this 12th day of March, A. D. 1883.

[Seal Superior Court of Baltimore City, Maryland.]

RICH'D T. ALLISON,
25 *Clerk of the Superior Court of Baltimore City.*

The above bond is approved this 13th day of March, A. D. 1883.

JAS. L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

The United States of America to the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland, wherein George W. Corson is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered
26 against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James L. Bartol, chief judge of the court of appeals of Maryland, this thirteenth day of March, in the year of our Lord one thousand eight hundred and eighty-three.

JAS. L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

Service of copy of the aforegoing citation admitted, this 14th day of March, A. D. 1883.

CHAS. J. M. GWINN,
Attorney General of Maryland.

27 STATE OF MARYLAND, *City of Annapolis*, } *To wit:*

I, Spencer C. Jones, clerk of the court of appeals of Maryland, at Annapolis, in obedience to the mandate of a writ of error awarded by the honorable James L. Bartol, chief judge of the court of appeals of Maryland, bearing date the 13th day of March, A. D. 1883, do certify that the foregoing record is a true transcript of the record and proceedings in the case of George W. Corson *vs.* The State of Maryland, as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the said court of appeals is the highest court of law or equity in said State in which a decision can be had in said case.

And I do further certify that the foregoing bond in said record is a true copy of the bond in said case which was filed in my office on the 14th day of March, A. D. 1883.

28 And I do further certify that the foregoing writ of error in said record is a true copy of said writ awarded by the said the honorable James L. Bartol, chief judge, as aforesaid, to the judgment of said court; and I herewith transmit the original of said writ.

And I do further certify that a copy of said writ was duly filed in my office for the State of Maryland on the 14th day of March, A. D. 1883.

And I do further certify that the copy of the opinion of the court of appeals in said record is a true copy of the same as rendered by said court in said case and on file in my office, and that said judgment in said court of appeals in said case was rendered on the 22nd day of July, A. D. 1881.

In testimony whereof I have hereunto subscribed my name as clerk of the said court of appeals of Maryland and affixed the official seal of said court at my office, in Annapolis, Maryland, on the fourteenth day of March, in the year of our Lord one thousand

29 eight hundred and eighty-three.

[Seal Court of Appeals, Maryland.]

SPENCER C. JONES,
Clerk of the Court of Appeals of Maryland.

Cost of transcript, $7.00.

Endorsed on cover: Maryland court of appeals. No. 211. George W. Corson, plaintiff in error, *vs.* The State of Maryland. Filed 29th March, 1883.

120-502

Office Supreme Court U. S.
FILED.
MAR 29 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the U. S.

October Term, 1885.

No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

Brief of the Plaintiff in Error.

S. T. WALLIS,
HENRY D. LONEY,
For Plaintiff in Error.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

Supreme Court of the U. S.

October Term, 1885.

No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

BRIEF OF THE PLAINTIFF IN ERROR.

This case comes up on a Writ of Error to the Court of Appeals of Maryland affirming a judgment of the Criminal Court of Baltimore City. The Indictment is founded upon an alleged violation of the License Laws of the State of Maryland by the Plaintiff in Error, the New York agent of a New York house, selling teas, by sample, in the City of Baltimore. It will conduce to an easier understanding of the particular questions involved, to state, briefly, the immediate history and condition of the legislation of Maryland upon the subject.

It will be seen by the Code of Public General Laws of Maryland adopted in 1860 (Vol 1, p. 386, Art. 56, secs. 37 to 56, inclusive), that there were originally two classes of licenses required to be issued to traders. Sections 37 to 40, inclusive, were applicable to non-resident traders specially and only; the remainer of the sec-

tions to traders resident. Those relating to non-resident traders constituted the legislation which was reviewed by this Court in the case of Ward *vs.* Maryland, 12th Wallace, 418, and will be found set forth, with others, on pages 419 and 420 of that report. (See also Rec. pp. 6 and 7.) Having been then pronounced unconstitutional, they have never since been acted upon, although they still remain upon the statute book, unrepealed. The law respecting licenses to resident traders continued unchanged, and constituted the entire legislation on the subject from that time until the year 1880, when, by an Act of the General Assembly of Maryland, of that year (chap. 349), the 41st, 42nd and 56th sections, above referred to, were repealed and re-enacted with amendments. It is under the Code, as modified by this last law, that the indictment here in controversy was found.

It will be perceived that by the sections originally applicable to resident traders only (sects. 43 to 55,) the amount of the license money provided to be paid is made, by a graduated scale, to depend upon the amount of the trader's

"stock of goods, wares and merchandise generally kept on hand by him, or the concern in which he is engaged, at the principal season of sale, or if said applicant shall not have previously engaged in such trade, or business, the amount of such stock he expects to keep as aforesaid."

The modification made by the Act of 1880 did not repeal or interfere at all with this measure of the cost of license or with the sections prescribing it, and, consequently, all persons to whom that act may be held applicable, whether non-residents or residents, are chargeable with such proportionate license fees as the goods, wares and merchandise, generally kept on hand by them at their principal season of sale, or expected to be so kept on hand, shall indicate. Section 41, as modified by the Act of 1880, provides that no person,

"other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale, any goods, chattels, wares

or merchandise, within this State, without first obtaining a license in the manner herein prescribed."

Section 42 provides, that when any person

"shall propose to sell, or barter, or dispose of, or to offer for sale, anything mentioned in the preceding section, except spirituous or fermented liquors, he shall apply to the clerk of the Circuit Court of the county in which he proposes to carry on such selling, or bartering, or disposing of, goods, wares, chattels, or merchandise; or if he proposes to carry on such selling or bartering, or disposing of, goods, wares, chattels, or merchandise, in the city of Baltimore, to the clerk of the Court of Common Pleas for a license therefor; provided, a license to offer for sale, issued by said clerk of Court of Common Pleas, or by the clerk of the Circuit Court of any county, shall be good and efficient as a license to offer for sale in every part of the State; provided, that such licenses shall not authorize the holder thereof to open or carry on any store or fixed place of business, for such selling or offering for sale in any other city or county, than the city or county in which such license shall be issued."

Section 56 provides, that

"if the applicant for a license lives out of the county or city, wherein he proposes to carry on such business of selling, bartering, or otherwise disposing of, or offering for sale, such goods, chattels, wares and merchandise, *or if the applicant lives out of the State*, or is unable to apply in person, by reason of sickness or bodily infirmity, his or her agent may apply for license, and make the affidavit as hereinbefore provided."

The affidavit here referred to, is that required by the 43rd section of the original law (still left in operation), as to the amount of the applicant's stock of goods actually or expected to be on hand, &c., as previously stated. It is manifest, not only from the general tenor of the 41st, 42nd, and 56th sections, as amended by the act of 1880, but from the specific language of section 56, that the law was intended to apply to persons living out of the State, who might, by themselves or their agents, desire to make, in Maryland, any sale or disposition of goods. The Court of Appeals

accordingly so held, and also that no distinction is made between sales by sample and other sales.

The Plaintiff in Error, as will be seen by both counts of the indictment (Record, pp. 1, 2), was a citizen and resident of the city and State of New York. He was an agent of the firm of Rosewell, Skeel & Co., also residents and citizens of the same City and State. It is the admission of the indictment that neither the Plaintiff in Error nor his principals had any store or place of business, temporary or permanent, or any stock in trade, other than samples of tea, in the State of Maryland. It is charged that the Plaintiff in Error made a sale, by sample, in Baltimore, of thirty packages of tea, which were then and there the property of Rosewell, Skeel & Co. These packages, it is averred, were, at the time, stored in the warehouse of the said Rosewell, Skeel & Co., in New York, and it is charged that the Plaintiff in Error had authority from his said principals to offer the same for sale and sell them, which he did, without first taking out a license. It is further the admission of the indictment, that neither the Plaintiff in Error, nor his principals, expected or intended to keep or have any stock in the City of Baltimore other than samples of tea, or to be engaged in any trade or business in the City of Baltimore, or in the State of Maryland, otherwise than in selling teas by samples, as aforesaid; that neither of them had any principal season of sale in the city of Baltimore, or State of Maryland; but that said Rosewell, Skeel & Co. had their only place of business in the City of New York, where their stock in trade, down to the time of the indictment, had been kept, and whence their goods, on being sold, had always been and then were shipped, directly, to purchasers, in the State of Maryland and other parts of the United States. The difference between the counts consists merely in that the first charges an offer to sell, and the second charges an actual sale, by sample, of the thirty packages of tea in question.

There was a demurrer to the indictment, which was overruled, and the traverser was thereupon fined twenty dollars and costs.

(Record, p. 3). Upon application for a Writ of Error, to be heard by the Court of Appeals, he filed his petition and assignment of errors (as required by the Maryland practice), which will be found on pages 3 to 5 of the Record. That writ was accordingly allowed. The Court of Appeals affirmed the decision of the lower Court, for reasons assigned in its opinion (Record, pp. 5 to 8), and the Writ of Error, here, was sued out, upon the ground that the suit involved the validity of a statute of the State of Maryland, which was impeached on the ground of its being repugnant to the Constitution of the United States, and that the judgment of the Court of Appeals was in favor of the validity of the statute and against the right and immunity specially set up and claimed by the Plaintiff in Error under said Constitution. (Record, p. 9). The case is reported in 57th Maryland, 251.

It will be observed, from what has been submitted, that the legislation in question requires licences to be taken out by non-residents of the State of Maryland, for the privilege of offering to make or making sales, or even a single sale, by sample (as in this case) within that State, not only where such non-residents have no place of business in Maryland, and no intention to have any, but although they have no stock of goods at any time within the State of Maryland, and have no intention of bringing any goods to Maryland, and although they are also without any purpose or intent to sell or barter at all in Maryland, otherwise than by selling goods, by sample, which, at the time of such sale, are in warehouse at the place of business of the non-resident vendor. It will be further seen that the cost of the license so required is measured by the stock in trade which the foreign trader may generally keep or may expect to keep on hand, at his principal season of sale. Inasmuch as, by the case made in the indictment, the foreign resident neither keeps nor expects to keep on hand any stock of goods in the State of Maryland, but only at his place of business, at his domicil, it follows that he is not taxed, in the assessment of his license fee, upon the footing of the resident trader of Maryland, who

is charged in proportion to the business which he does in Maryland, and upon the stock which he keeps or expects to keep there for its transaction, but is mulcted in proportion to the whole business done by him, not only in Maryland, but at home and everywhere else, and to the amount of the stock which that entire business requires him to keep in New York at the principal business season of the year.

ASSIGNMENT OF ERRORS.

The Plaintiff in Error respectfully submits, that the lower Court erred in holding,

1. That the imposition of the license in question did not violate article 1st, section 8, clause 3 of the Federal Constitution, whereby it is provided, that "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

2. That it did not violate article 4, section 2, clause 1, of the same instrument, whereby it is provided, that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

3. That it did not violate sub-section 5, of section 9, of article 1st, of the Constitution, whereby it is provided, that "No tax or duty shall be laid on articles exported from any State."

4. That it did not violate section 1st, of article 14 of the Amendments to the Constitution; whereby it is provided, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law."

The Court of Appeals of Maryland did not specifically consider, in its opinion, the clauses of the Constitution which are referred to, in the third and fourth of the above assignments of error. The conclusion at which it arrived could, nevertheless, not have been

reached, without refusing to the Plaintiff in Error the rights and immunities thereby secured to him. On page 266, of 57th Maryland, it will be seen, that without reference, specifically, to those particular clauses, the Court fully considered and adjudicated the questions and rights arising under them. The Court appears to have regarded the right of a State to impose a tax, in the way of license, upon all pursuits and occupations within its limits, as disposing of all the objections which were raised by the Plaintiff in error, and which will be found in detail on pages 251 to 254 of 57th Maryland. Indeed, their Honors quoted, in words, the language of this Court, establishing the doctrine, as to the State right referred to, but omitted to cite the qualification with which this Court accompanied it, in Welton *vs.* the State of Missouri (91st U. S. Reps., 278), to the effect, that the licensing power, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution.

I.

The Constitutional provision relied upon in the first Assignment of Errors, has been so often considered by this Court, and its meaning and effect have been so frequently and so definitely announced and enforced, that much reference to cases would seem to be superfluous. One thing, beyond all peradventure, is asserted by the Court, in all its adjudications on the subject, and that is, that there is no form of phrase, or ingenuity of enactment or device, by which the application of the principle can be escaped or evaded. The power of Congress to regulate commerce between the States, whether legislatively exercised, or not, in respect to any specific matter in controversy, is held to be exclusive without exception, save in matters of a local character and without any national bearing or application. Brown vs. Houston, 114 U. S., 622. Of course, the case now under consideration belongs to the sphere of national commerce and control, if it is at all within the

scope of the Constitutional provision. The license here is imposed upon citizens and residents of other States than Maryland, contracting in respect to property situate beyond the limits of Maryland, and to be transported to that State, under the contract, by the usual channels of interstate commerce. If the legislation impeached interferes with the commerce, by which the goods sold and being in New York are to be transported to Baltimore, for the purpose of being mingled with the mass of property in Maryland, and before they are so mingled, it is plainly a State regulation of commerce and forbidden by the Constitution. Welton vs. Missouri, 91 U. S., 275, 281.

It will not be disputed that the New York merchant, desiring to sell goods in Baltimore, has a perfect right to communicate with customers in Baltimore, by mail, and to transmit his samples for selection, either by mail or by express, to any proposed purchasers. The law in controversy prohibits him from doing, by a messenger or agent, whom he sends to Baltimore, the identical thing which he can thus do by mail or express. In other words, it is a prohibition of his doing, in Maryland, the same thing, by the same contract, with the same result, as to the same subject, which it is his undoubted right to do in and from New York. The intervention of the travelling messenger or agent, though he brings no goods into Maryland, but only samples, is supposed to constitute a difference in principle, between the two cases. And, while it must needs be conceded that the State of Maryland would have no right to interfere with sales made by the New York merchant, in the former manner, it is insisted that, when he makes them by the latter, the mere casual and temporary presence of his agent in the City authorizes the State of Maryland to lay a tax in the way of license upon the same identical transaction. It is respectfully submitted, that this distinction is unreal and has no foundation in principle. The sale being of goods, at the time in New York, which are purchased and sold for the purposes of the Baltimore market, and the transmission of the goods

from New York to Baltimore being the special purpose and result of the contract, it would seem to follow, of necessity, that the State of Maryland, if it is allowed to exact license for the privilege of making the transaction in Maryland, has imposed that much burden upon the commerce between the two States.

In the case of the County of Mobile *vs.* Kimball (102 U. S., 691), this Court, in defining those regulations of commerce which are national in their character and require uniformity of regulation, affecting all the States, has used the following language: "Of the former class may be mentioned all that portion of commerce with foreign countries, or between the States, which consists in the transportation, purchase, sale and exchange of commodities. Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe." (P. 697). Further on, (p. 702), the Court explained, that "commerce with foreign countries and among the States, strictly considered, consist in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country, can alone adopt such a system. Action upon it by separate States is not, therefore, permissible." Nor is the application of this principle to be varied or escaped by the substitution of a license for direct taxation of the merchandise sold and transported.

Cook *vs.* Pennsylvania, 97 U. S., 570 *et seq.*
Machine Co. *vs.* Gage, 100 U. S., 678.

In 91 U. S. (Welton *vs.* The State of Missouri, pp. 278 to 282), the Court has fully expounded this doctrine. On page 278, your Honors determined, that where the business or occupation consists in the sale of goods, the license tax required for its pursuit, is, in effect, a tax upon the goods themselves. "If such a tax be within

the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it would not be any the less invalid because enforced through the form of a personal license." The Court, accordingly, held (p. 279), that the license tax exacted by the State of Missouri from dealers in certain goods must be dealt with as a tax upon the goods themselves. On page 280, the Court added: "Commerce is a term of the largest import. It comprehends intercourse, for the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States." On p. 281 it is further said, that "The power which insures uniformity of commercial regulation must cover the property which is transported, as an article of commerce, from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subject, like it, to similar protection and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restriction by such legislation, the object of vesting the control in Congress may be entirely defeated." Although, of course, as the Court observes, it is difficult in cases of this character, to draw the line at which the commercial power of Congress ends and the power of the State begins, it is confidently believed that no such difficulty exists in the case at bar. The property is in New York, mingled with and part of the mass of property of that State, subject to taxation, under its laws, either directly, or through a license, or both. The owner desires to sell it to customers in Baltimore, and citizens of Baltimore desire to purchase it, for the purpose of mingling it with their own stock there. By purchasing, transporting and so mingling it, they render it liable, in Baltimore, as it was in New York, to the operation of the local license law and the imposition of the

local taxes. In this commercial transaction, between citizens of different States, for the purchase and sale of merchandise in one State and its transportation to another, the State of Maryland intervenes, declaring, by its legislation, that the foreign seller shall not have the privilege of making it without paying a tax, in the shape of a license, on the sale which he makes, and on the goods which he sells.

It is quite idle (speaking with due respect), to say that this is, really, a tax upon the "avocation" of the New York vendor or his agent in Maryland. The law does not impose a license tax upon the foreign vendor, or his agent, on the theory of his pursuing an avocation in Maryland. On the contrary, he cannot make a single sale in that State without a license, or without incurring penalties, if he has none. In the indictment, in this case, as has been said, it is not averred that the traverser carried on, or intended to carry on, any business in the City of Baltimore "otherwise than in selling by samples." It is expressly averred that he had no intention whatever of bringing goods to Baltimore, or having them there or establishing any place of business there. He did not reside in Maryland, but was simply there, occasionally, for the purpose of exhibiting samples and taking orders from the resident traders, on behalf of his non-resident principal. And what renders the case still clearer, is the fact that the tax which he was required to pay, in the shape of a license, is not a tax upon goods which he had or expected to have in Baltimore, but upon the whole stock of goods of his principal in the City of New York—that is to say, the stock which he had on hand there, or expected to have, at his principal season of sale. The stock in New York must be and is kept by him there, for sale to customers throughout the entire United States, and is large in proportion. If it be in the power of every State to tax him, on its entire value, for the sales which he may make in such State by sample and through his agents, it is perfectly manifest that an end is put to his capacity to do business at all. So far as he is concerned, commercial transactions are practically prohibited, because

they are rendered financially impossible. His taxes, or licenses, will amount to more than his profits, and perhaps more than his sales.

In fact, it is apparent that the statute, which is here impeached, is not only a regulation of commerce, in the sense that it interferes with commercial transactions between the States, but in that of its absolutely prohibiting, within the State of Maryland, the commercial competition of non-resident traders. The resident trader in Maryland is taxed, as such, by license, upon the business which he does in the State and in proportion to its amount, but not otherwise. His stock of goods is there, his residence is there, his place of business is there. His stock is subject to direct taxation, as any other property, and to indirect taxation, by license. But he pays nothing, in the way of license, except upon goods which are in Maryland, mingled with the general mass of taxable commodities and property—goods which he holds and disposes of in Maryland, under that protection of its laws, which is the foundation of the right to tax. He pays no importation tax of any sort. The foreign merchant, on the contrary, without having any goods there, unless samples be goods; without any residence, except that which is occasional and temporary; without any place of business; without asking or receiving any protection to his property from the laws of Maryland, is exposed to the different, the much larger and more extensive exaction which has been indicated. The law under consideration was passed, as has already been stated, for the express purpose of covering the case of non-resident traders, who, down to the decision of this Court, in Ward *vs.* Maryland, had been dealt with illegally, and from the time of that decision to the passage of the law now in controversy had not been dealt with at all. It was an attempt, under color of a simulated equality of imposition, to escape the principle which this Court had applied in Ward's case. Its result was to establish a real inequality which is manifest, from the most cursory examination of its provisions. Its real purpose was to exclude the competition of the non-resident trader, by a

disguised, though effectual, discrimination. It comes strictly within the ruling in Walling *vs.* Michigan (116 U. S., 454), that a tax on persons who, not having places of business in a State, engage in the business of selling or soliciting the sale of goods to be shipped into the State, is a discriminating tax leveled against such persons.

It was very much insisted, in the argument below, (See 57 Md. 256, 257), that, as the contract made by the traverser had for its object the sale of goods to be brought to Baltimore, and as the property in the goods was assumed to pass to the vendee without actual delivery, upon the theory that the sale appropriated to the vendee specific chattels sold, the goods were to be regarded, in contemplation of law, as constructively, though not actually, brought within the jurisdiction of the State, and so intermixed with the mass of property there, as to be subject to the taxing power of the State and deprived of their "distinctive character as an import." It would be sufficient to say, in reply to this, that the sale in Baltimore, by sample, of thirty packages of tea, without more, as alleged in the indictment (the tea being at the time in New York), is not a sale of thirty specific packages, so as to furnish any premises for the argument in question. But, even if this were not so, the suggestion that a constructive delivery of the goods in New York is an actual introduction of the goods into Maryland, while they are actually in New York, and has subjected them, *ipso facto*, as against the non-resident vendor, to the taxing power of Maryland, which State they have not yet reached, is one which will hardly receive countenance. It is the actual presence of chattels, belonging to non-residents, within the taxing jurisdiction, which alone renders them open to taxation (State-tax, &c., 15 Wallace, 319). But, putting even this apart, it is manifest that if the point were regarded as at all tenable, it would only establish the fact that the goods had become the property of the Maryland vendee, and might be lawfully taxed, in his hands, directly, or by license. But that the introduction of goods into Maryland, constructively or actually, by the local vendee, as his

goods, can be a justification for imposing a tax on the vendor, as if they were his goods in Maryland, is a proposition which certainly seems to require reconsideration. As to the contention that by reason of the sale and the constructive delivery (if such there were) in New York, the property, though still to be imported into Maryland, had lost "its distinctive character as an import," it need only be said, that if it be law, it would apply equally to similar purchases in foreign countries, and foreign goods, so purchased, would be already imported, in the eye of the law, though still in the foreign warehouse.

The Court of Appeals has undertaken to meet the views thus submitted on the part of the Plaintiff in Error, by little more than the simple statement that it is unable to perceive their force. It declares that the legislation in question is free from the objection adjudged to be fatal in Ward's case, because it does not impose a discriminating tax upon non-residents. On the contrary, it is of opinion that the same rate of license is required of the citizens of the State as of non-residents. It pronounces the statute, under consideration, to be in no sense a restriction of commerce, because "it *does not purport to be a tax on the transit of goods through the State* for commercial purposes." It determines that the license is not a tax upon the goods constituting the mercantile stock of the person who obtains it, but that the Legislature, in regulating the rate or cost of the license, has merely adopted, as a standard, the amount or value of the stock in trade of the dealer. Domestic traders are required to pay the same rate of license, and this the Court says "is imposed on them as a tax on their occupation or business as vendors of goods. It is not, and has never been, as a tax upon their stock of goods as property; for that is taxed, under the General Laws of Maryland, as property within the State." "So," the Court continues, "where a person, not residing within the State, who wishes to carry on the same business within its limits, is required to pay the same rate of license, regulated by the same standard, it cannot be successfully maintained that the license is a

tax upon his stock of merchandise situated in the State within which he resides." In fact, the Court's whole theory of the case is substantially the same as that on which it founded its erroneous decision in Ward's case (Ward *vs.* State, 31 Md., 279.) It is somewhat difficult to deal with this method of considering the question. It is very easy to perceive that, although the same "rate" of license is required from citizens as from non-residents, the license itself may be much greater under the same circumstances, in one case than in the other. If the rate were applied exclusively to residents, or to goods had for sale, or even to actual sales made, in the State of Maryland, whether by residents or non-residents, there might be color for holding that the taxation would be equal. But where, as has been shown, the same rate of license is applied to goods in New York which is applied to goods in Maryland, and the privilege of selling such foreign goods, in Maryland, is taxed upon the basis of goods held and only taxable at the foreign domicile, and not at the place of sale, it is manifest that the apparent identity of the rate and of the standard furnishes no real criterion of equality in the impositions. The Court admits that the foreign vendor is compelled to pay a license in proportion to his stock of merchandise at home, but it holds that the license is purely a personal one, and not a tax upon the stock by whose value it is graded. Such a distinction, it is respectfully submitted, will not bear the test of the decisions of this Court, already cited. And, even if it were well taken, it would be of no avail, for the State of Maryland has no more right to fix a standard of license fees which is practically discriminating against the non-resident, than she would have to tax his goods or his sales by the same discriminating standard. Nor is a statute to be regarded as not a restriction upon commerce, for the reason that it "does not purport to be a tax on the transit of goods." The question is not as to what the statutory imposition purports to be, but what it is; and if, in effect, it be a tax on the transit of goods from the State of the vendor to the State of the vendee, it is of very little importance by what name it may be called. If the effect of the Code is to compel

the foreign vendor to pay a tax in proportion to goods situated out of the limits of Maryland, for the privilege of making, within those limits, a contract for the sale and transportation of those goods, the tax, for all the purposes of the Constitutional prohibition, is as much a tax on the foreign goods, as if it were assessed and levied as such. If the foreign vendor, under the law here in dispute, is not rated as to his license by the value of his stock, at his domicile, it is impossible to say upon the value of what stock his license is to be calculated. If he pays for the privilege of selling in Maryland, by sample, a license fee proportionate to his New York stock, when his warehouse there is fullest, it is equally impossible to contend, with reason, that his New York stock is not taxed to that extent.

It is a *non sequitur* to say, with the Court below, (57 Md. 266) that because the goods of the domestic vendee are taxed under the General Laws of Maryland as property within that State, the trader's license which he pays to sell them is not equally a tax upon them. There are notoriously such things as additional taxes, which do not amount to duplicate taxation, in the obnoxious sense of that phrase. Illustrations of this are not needed, nor is it necessary to say that the case of one tax on the goods and another on the business is one of them. Cooley on Taxation, 159, 164. It may well be that a State imposes a tax on goods, as goods merely, in common with all other personal property throughout the State, while, at the same time, it regards those goods as property justly liable to additional taxation, by reason of its additional value, in use and disposition, as the subject matter of trade. The citizen, not a trader, who merely holds and enjoys personal property, without making a business of selling and re-selling it, cannot certainly be regarded in the same light as the person who uses it for the purposes of traffic. The goods of an active merchant are turned over and over, in part if not in whole, very often in the course of a year. Although he may be taxed upon them once, as property, at the ordinary season of levy, at their then amount and value, he

probably, before the next season of levy arrives, will have had several times the same quantity of goods, untaxed, which have passed through his hands to customers, with profit in every transaction. The difference, therefore, is very obvious, as to taxation, between goods which are comparatively inert, as a part of the ordinary wealth of the community, and those which enter into the mass and movement of its trade. Of these last, a single annual assessment would probably represent but a fraction of the value created by successive replacements of goods sold and their profits. The trade gives a value to the stock in trade, over that which it would otherwise possess as mere chattels; and, as a stock in trade, earning profit by being such, it ought, upon all sound principles, to be taxed in proportion to the advantages in respect to it which the trade affords. But whatever be the proper economical theory upon this subject, it is believed to be very clear, under the decisions of the Court already referred to, that a license for the sale of goods, and especially where it is graduated by the amount sold, or for sale, is, in contemplation of law, a tax upon the goods themselves.

So much for the discriminating feature in the commercial regulation impeached. But, although discrimination of the sort has been frequently discussed, in cases arising under Art. 1, sect. 8, clause 3, of the Constitution, because it has been presented by the facts of those cases, and supplied an argument *a fortiori*, it is respectfully submitted that any State Legislation, by which the exclusive power of Congress has been invaded or commerce impeded, is unconstitutional, whether discriminating or not. The question of discrimination would appear, more logically, to arise in considering an alleged violation of the provision which secures equality of "privileges and immunities" throughout the States. It is therefore believed that the argument respectfully presented on pp. 8 and 9 of this brief is controlling upon the point raised by the 1st Assignment of Errors. This view has the explicit sanction of Mr. Justice Bradley, in the separate opinion filed by him in Ward *vs.* Maryland (12 Wal., 432), where he holds that the statute there

condemned was in violation of the commercial clauses of the Constitution, "and would be so, *although it imposed on residents the same burden, for selling goods by sample, as is imposed on non-residents.* Such a law would effectually prevent the manufacturers of the manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is in fact a duty upon importation from one State to another, under the name of a tax."

This doctrine is not found to have been at variance, when announced, with any previous ruling of the Court and appears to have been fully sustained and adopted in Walling *vs.* Michigan, 116 U. S., 446, 454. See also Brown *vs.* Houston, 114 U. S., 632.

II.

What has already been said applies, for the most part, with equal propriety and force to the second and third Assignments of Errors. If it be true that the license in question is a tax imposed upon the sale and transportation of goods, as between different States and the citizens thereof, it would seem necessarily to follow that such license is practically a tax or duty laid on articles exported from the one State and imported into the other. If the New Yorker is unable to sell his New York goods in Maryland and ship them to that State, without paying a tax upon the whole of his New York stock, while the citizen of Maryland is only taxed in proportion to his stock in trade in Baltimore, it would also seem apparent that the citizen of New York is deprived of the privileges and immunities in Maryland which the citizens of that State enjoy.

The Baltimore merchant, going to New York to purchase goods, which he would otherwise purchase from the New York merchant by sample, through the travelling agent of the latter in Baltimore, does, practically, the identical thing, so far as he is concerned, which the purchase by sample would result in, subject only to his personal

expenses. He examines the goods in New York, and, after making his selections, directs them to be forwarded to him in Baltimore. They reach him there without any other charge on them or their transit than the ordinary cost of transportation. The New York merchant, selling the same goods by letter and sample, transmitted through the mail or by express, and his Baltimore customer, buying in that way, would also be equally free from any Maryland imposition upon the transaction. When, therefore, a foreign merchant is compelled to pay license for selling the same goods, with the same result, merely because he sells them through a temporary agent by sample, he is made to pay something which is a clear and additional burden upon his traffic. It is a burden which he cannot escape, if he desires to carry on commerce with Maryland by messenger and not by letter. It is something, therefore, which the State of Maryland imposes on him, for its revenue, or for a supposed benefit to its local traders, and which the Maryland trader is not exposed to. So, also, the New York trader, if he were to change his residence to Maryland, and establish his business in that State, would be only liable to a tax in proportion to the part of his stock of goods which he might have there; while if, as a resident of New York, he desires to sell by sample in Baltimore, without removing there, he is taxed, not according to the value of his sales, or of any stock he may have temporarily in Baltimore, but, according to the value of his whole stock in a distant city and a different State, it seems plain that he does not enjoy the immunities, as a New Yorker, which the simple change of his residence to Maryland would give him. "In all such cases the test question is, whether there is any discrimination. . . . . Whenever there is, such discrimination is fatal."

Machine Co. *vs.* Gage, 100 Wallace, 676, 679.
Brown *vs.* Houston, *Ub. supra.*

It is believed that no clearer violation of the constitutional guaranty involved could very easily be stated.

III.

It may be assumed, as already shown, that no principle is more firmly established than the illegality of taxation, by any State, of property which is situate in another where the owner has his domicile. The State of Maryland has no more right to tax the goods of a New Yorker, in New York, than those of an Englishman, in London. Nor can the temporary stay or residence of the foreign citizen, in Maryland, without change of his residence or place of business, and without any removal of his goods to Maryland, render the taxation of those goods, by the latter State, any more allowable. This Court has already held that illegal taxation is one of those deprivations of property which are within the scope of constitutional protection.

R. R. Co. *vs.* Jackson, 7 Wallace, 262.
State Tax, &c., 15 Wallace, 300.
Hagar *vs.* Reclamation Dist., 111 U. S., 701.

Any law which abridges the privileges or immunities of a citizen, by compelling him to submit to taxation, which is contrary to common right, is certainly one of the most flagrant wrongs to which he could be subjected. Where the non-payment of such taxes, so illegally imposed, is made the subject of criminal prosecution and punishment, there is no violation of the guaranteed rights of the citizen that more strongly and properly invites reprehension. (See the important opinion of Mr. Justice Field on the Circuit, in the R. R. Tax Cases, 13 Fed. Reporter, 722.)

It has been shown that the license, under the Statute here complained of, has the result of imposing such unwarranted taxation upon the citizens and residents of other States, and the Plaintiff in Error has been indicted and convicted because of his refusal to submit to the imposition. Unless the Constitution protects him, he has no other resource. It may be said, of course, that if a citizen of New York does not desire to make the sales in Maryland

which render him subject to this imposition, he has opportunity and the right to abstain from making them. Upon this theory, if he incurs the penalty, it is because he elects to do so. But if he has the right, as a citizen, to do the thing which he elects to do, for the promotion of his trade and interests, without being subject to other impositions than those within the purview of the fundamental law, it is obvious that he has equally the right to do it and resist such imposition. He is under no obligation to forego a right in order to escape consequences which the law denounces and forbids. These, of course, are but the commonplaces of the question, and so trite as scarcely to be stated without apology. Nevertheless, it is difficult to avoid stating them, when they have been overlooked by the local legislatures or tribunals, to the detriment of the citizen.

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IN THE

Supreme Court of the U. S.

October Term, 1885.

No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND, DEFENDANT IN ERROR.

Brief of the Plaintiff in Error in reply to the Additional Brief of the Defendant in Error filed on the reargument of the cause.

S. T. WALLIS,
HENRY D. LONEY,
For Plaintiff in Error.

JOHN MURPHY & CO., PRINTERS AND STEREOTYPERS, BALTIMORE.

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An Additional Brief is submitted by Defendant in Error in lieu of the oral argument allowed by the Court. It does not sufficiently alter or add to the views presented in the original brief of the Defendant in Error and already discussed at the bar, to justify more, in reply, than a limited trespass by the Plaintiff in Error on the indulgence of the Court.

The matter for determination is not merely (as stated in the Additional Brief, p. 3) a question as to the constitutionality of the Maryland Statute, in that it requires non-resident traders "*to obtain a license*," in the case supposed. It goes much further and involves the

consistency with the Constitution of the mode, measure and character of the particular license which is required, and which the Plaintiff in Error was fined for not having taken out. Neither brief filed by the Defendant in Error attempts directly to meet this issue. A brief recurrence to the facts which bear on it may be pardoned, in view of what is believed to be its controlling importance.

By Article 56, section 41, of the Maryland Code as amended (Record, p. 7), it is provided that no person, &c., shall barter or sell, &c., "without first obtaining a license in the manner herein prescribed." Section 43 (Id. Ib.) prescribes the manner and provides that the applicant for a license shall state on oath, upon his application, the amount of the stock of goods which he, or the concern in which he is engaged, generally keeps on hand or expects to keep on hand at the principal season of sale. Section 56 (Record, p. 7) provides that if the applicant lives out of the State, his agent may apply and make the prescribed affidavit in his stead. By Sections 44 to 55 (Record, p. 7) the rate of license which the applicant is required to pay is graduated according to the amount of the stock in trade which he has sworn that he had or expected to have, as above, at his principal business season. The Code is entirely silent as to where such stock in trade is or is expected to be—whether in or out of the State—but its requirements apply, of course, to non-residents as well as residents.

The indictment against Corson was prepared on consultation between the counsel of the State and of the traverser, so as to present on its face every fact necessary to raise all questions by demurrer—the case being intended as a fair and candid test case. Accordingly it is averred specifically (Rec. pp. 1 and 2) that the traverser and his principals were both residents and citizens of New York; that the tea offered for sale and sold was, at the time, in New York in the warehouse of the vendors; that neither they nor the traverser were or ever intended or expected to be engaged in business in Maryland otherwise than by selling samples; that they never intended or expected to keep or have any stock in Maryland other

than samples, and that they had no principal business season in that State or any place of business temporary or permanent therein.

Upon the case of fact and averment thus made, one of two things was obvious, viz: either

1. That the traverser could not obtain a license at all, because he neither had nor expected to have any stock of goods in Maryland or any place of business or principal season of sale there, or

2. That in order to take out a license and make the affidavit required to obtain it and fix its graduated cost, he must state on oath the amount of the stock which his principals generally kept or expected to keep on hand, at their principal season of sale, in the only place where they kept any stock, or had any place of business or season of sale, viz., New York.

The first alternative was naturally rejected by the State as the true theory of the case, because it involved a concession that the statute precluded non-resident merchants from taking out a license to sell in Maryland and yet fined them for selling without one. At best it denied to the New Yorker the right of selling or offering to sell in Maryland, unless he not only took out a license, but established a place of business and kept or was to keep a stock of goods on hand there, as a condition precedent to being licensed. This discriminating interference with the equal rights and privileges of citizens of other States was too plainly unconstitutional to be maintained, and the second alternative above stated was consequently adopted by the prosecution and the Criminal Court—the statute being construed to mean that the non-resident merchant, applying for a license and having no stock in Maryland and no place of business, or principal business season there, must make affidavit as to his stock on hand in the place where he kept it, and pay for his license in proportion to its amount. The traverser accordingly, in suing out his writ to the Court of Appeals, assigned as error, that the Court of first instance, in overruling the demurrur, had determined, 1st, that the State of Maryland had authority to impose taxation on the goods of non-residents, which were actu-

ally out of that State and in other States of the Union, as a condition precedent to their being allowed a license to sell in Maryland, and 2d, that Maryland had the further right to measure the cost of such license by the amount of the goods of the non-resident applicant, kept for sale at the place of his residence and in his general business there, and not in Maryland. (See 5th and 6th Assignment of Errors below, Rec. pp. 4 and 5.) The Court of Appeals sustained the Court below, and in considering the error thus assigned attempted to get rid of the difficulty (Rec., p. 8) by holding that the license was not a tax on the stock of goods of either resident or non-resident, "as property," but was only "a tax on their occupation or business as vendors of goods" in Maryland, which was clearly within the constitutional power of the State. This view is likewise urged in the Additional Brief of the Defendant in Error (pp. 5 and 6), and is supplemented further (Add. Brief, p. 11, parag. 4 and 5) by the argument, that while the amount of money required as the price of a license is not a Federal question (which as a naked proposition may be safely conceded) the price of a license may, with great justice, be measured, in any License Act, by the amount of merchandize any where in the possession of the party licensed, since he may, if he pleases, sell the whole of it in the locality where the license is granted.

In reply to this latter view, it seems only necessary to say, that the amount of license fees may and indeed always must involve a Federal question, whenever, by reason of the inequality of amounts or the mode of ascertaining and exacting them, or otherwise, there is an invasion of the constitutional rights of non-residents. To the argument that the license of a New York merchant to sell in Maryland may justly be measured by the full amount of the goods in his possession in New York for sale to the entire nation, because, if he chooses, he may sell them all in Maryland, the answer seems equally obvious. The Maryland trader is justly taxed on the amount of his stock in Maryland, where he resides and is taxable, because he has it or means to bring it all there, for sale there, in his business and at

his place of business there. If the New York trader were taxed on the amount that he has, or expects to have, on hand (even in New York) for sale in Maryland, there might be some color of analogy between the cases. But the New Yorker sells to the whole country. The very indictment avers (Record, p. 2) that the stock in trade of the traverser's principals was kept in New York for sale to purchasers in "other parts of the United States" as well as Maryland. To make them pay a license for selling in Maryland, on the basis of the entire stock which they keep for sale, in New York, to their whole trade there and throughout the Union, would be too manifestly unjust and unequal to require discussion. But when it is added, that if they choose to exercise their right to sell by sample in every state of the Union, each state, according to the doctrine of the Defendant in Error, has a right to fix the rate of their license on the basis of their entire home stock in trade—kept on hand to be sold everywhere and naturally taxed at home also—the thing ceases to be merely unjust; it becomes monstrous.

The case at bar then being that the non-resident merchant, in order to sell in Baltimore, must pay a license in proportion to his entire stock at his domicil, and not to the stock which he sells or proposes or expects to sell, by sample or otherwise, in Maryland, the question, as we have already stated, is not merely whether "*a license*" can be constitutionally imposed on the non-resident, before he is allowed to make, in Maryland, by samples and through a travelling agent, the same sales which it must be conceded that he could lawfully make, by sample, without license, through the mail or the express offices; but whether *the particular license*, exacted under the Maryland Statutes in dispute, and measured, as to its rate, by the whole "merchandize in possession of such dealer," (Additional Brief, p. 11) at his domicil, is or is not in contravention of the Federal Constitution. Is it merely a tax on the occupation or business of the non-resident vendor carried on in Maryland, as held by the Court of Appeals, or is it a tax on his goods, under the ruling of this Court in Welton vs. Missouri (91 U. S., pp. 278–282)

and Walling vs. Michigan (116 U. S., p. 466) where that doctrine was enforced, although the tax was imposed, in words and *nominatim*, on the calling licensed? It is not proposed to take advantage of the indulgence of the Court by repeating what has been heretofore submitted on this point (Brief of Plaintiff in Error, pp. 9–13) and others in the case. A few additional observations however, will, it is hoped, be admissible.

The question of discrimination, it is respectfully submitted, has no necessary or logical relation to the enquiry as to whether there has been an invasion, by a State, of the constitutional power of Congress to regulate commerce. An analysis of the decisions of the Court it is believed will show, that where the two questions have been blended, it has been because the legislation impeached has appeared to trespass in both directions, and where the Court has placed its judgment, to any extent, upon the ground of discrimination, it has been either because that ground was entirely sufficient to dispose of the controversy, or because it came in aid of the other ground, which the non-legislation of Congress has surrounded with difficulty and judicial embarrassment. As matter of law, however, there is no inherent association between the two subjects, and if a State law undertakes to regulate commerce within the sphere assigned by the Constitution to Congress, it must be void because it is a regulation of commerce, without more. It may discriminate or not, but, if it regulates commerce among the States, it is quite as unconstitutional when it does not discriminate between the citizens of different States as when it does.

This observation is made, because it seems be assumed in the Additional Brief of the Defendant in Error that the constitutional difficulty is removed if the question of discrimination is put out of the case. How far the Maryland Statute in the matter at issue is a regulation of commerce, has been already discussed in the brief of the Plaintiff in Error (pp. 7 to 13) and at the bar. The doctrine on which we rely is condensed in the opinion of Mr Justice Bradley in Ward vs. Maryland (12 Wallace, 432), and is

vigorously stated by Mr. Evarts in his argument in that case (12 Wallace, 422), where he says, that "a regulation by a State of the manner in which trading within it may be carried on by citizens of other States, and in respect to merchandize to be introduced from other States, touches the main affirmative power of ordinary active commerce between the States." Perhaps no better test of the validity of the Maryland Statute in that regard can be found, than the enquiry, whether an Act of Congress regulating the manner in which goods shall be sold by sample, in other States than those where the vendor resides and the goods are, and prohibiting the execution of such State licenses as that under discussion, from non-residents, would be constitutional. If it would be, it could only be as a regulation of commerce among the several States, and, its being such would clearly show the matter to be beyond the purview of constitutional State legislation.

What is said in the Additional Brief of the Defendant in Error on the subject of discrimination (p. 3) appears to have been sufficiently anticipated in the Brief of the Plaintiff in Error (pp. 14 to 18), where the fallacy of the contention that the Maryland law "accorded equal privileges and immunities to all persons, whether resident or non-resident of the State," is believed to have been shown. It may not be amiss, however, to suggest an additional consideration which is not as apparent, on the face of the statute impeached, as others which have been presented. We allude to the fact, that while the New York merchant is compelled to take out a license proportionate to his whole stock in New York and elsewhere, for the privilege of selling a portion of that stock in Maryland, and is thus practically taxed, in the latter State, for what he sells everywhere, outside of it, the Maryland trader is not required to pay license in regard to any stock which he may have elsewhere and may choose to sell where he has it, by sample or otherwise. He may go to Pennsylvania, for instance, and sell, there, the identical goods that he has purchased at home from the New York sample-seller, without paying anything, by way of license, to the

Treasury of Maryland for the privilege of doing so. In other words, the statute is satisfied if the resident trader pays license according to the value of his home stock alone at his principal season, though he should sell away from home, while his non-resident rival, who has no home stock in Maryland and no principal season there, is forbidden to compete with him in the Maryland market, unless he pays license in proportion to all the merchandize that he possesses in all markets.

There is little, if anything, new contributed by the Additional Brief of Defendant in Error to the discussion as to the validity of the Maryland law under Section 1, Article 14, of the Constitution as amended. Indeed the full presentation of the doctrine and decisions on this point, in the opinion of the Court delivered by Mr. Justice Field in 114 U. S. Rep., 196 (Gloucester Ferry Company vs. Pennsylvania) would seem to supersede further argument, if the Maryland non-resident's license is regarded by the Court as a tax on his New York merchandize. Nothing can be clearer, under that decision, than the principle assumed in the original Brief of the Plaintiff in Error (p. 20), that no State has the constitutional power to tax the property of non-residents situate beyond its limits, on the ground that they have come within those limits to do business without changing their domicile (114 U. S., pp. 205, 206, 208 to 210).

The counsel for the Plaintiff in Error are not sure that they fully apprehend the point endeavored to be enforced in the Defendant's Additional Brief (from p. 6 to p. 11). It appears to be the same made in the original Brief of Defendant in Error (pp. 7 to 11), and replied to by Plaintiff in Error in his original Brief (pp. 13 and 14), and is practically this: that the sale made by Corson, in Maryland, vested the right of property in the teas sold in the Maryland purchaser at once, and that the property so vested acquired, instantaneously, a Maryland *situs* and became taxable in Maryland, as Maryland property, though still, bodily, in New York. Such *situs* was sufficient, in itself, it is argued (Add. Brief, pp. 6 to 8) to maintain the validity of the Maryland license tax.

Inasmuch as it was the vendor and not the purchaser on whom the license tax was imposed, it is difficult to perceive how the acquisition of the taxable property by the latter could justify the tax on the former who had parted with it. Nor is it the fact—if it amounted to any thing—as stated in the Additional Brief (p. 9), that an actual immediate delivery of the teas sold to the Maryland purchaser is admitted in the indictment. The indictment merely recites, as the custom of the vendors' trade, that their goods, on being sold, were shipped directly from New York to the purchasers (Rec., pp. 5 and 6). "Directly" is not used to signify "immediately." Its obvious meaning is, that the shipments were made without further intervention of the vendors' agent or any other middleman. But, whether there was a constructive or an actual delivery of the goods to the vendor, upon or after the sale, can have no bearing, in any aspect, it is respectfully submitted, on the question of the validity of the Maryland Statute. That statute requires the license to be taken out before selling, and of course no result of the selling can retroactively legalize the exaction, if illegal when made. Nay, the statute does not even require any sale to be made at all, in order to establish the criminality of the non-resident vendor by sample. It punishes him, if he even offers his goods for sale, without license, though the person to whom he offers them may not buy. What possible relation then can there be, between the doctrine of constructive or actual delivery to the vendee, upon or after a sale made, and the constitutionality of the tax so imposed on the vendor? Even if the amount of tax were measured by that of the particular sale, there would be no connection between the subjects for the reason supposed, but there is not even that semblance of relation, because the tax is proportioned to the entire yearly sales, contemplated as well as made.

In the original brief and the oral argument of the Plaintiff in Error, the Maryland Statute was tested exclusively by its language and legal effect, without any imputation of concealed illegal purpose.

This Court, however, speaking by Mr. Justice Miller, in Morgan vs. Louisiana (118 U. S. Rep. 462) has used the following language:

"In all cases of this kind it has been repeatedly held that when the question is whether the State statute is a just exercise of State power, or is intended by roundabout means to invade the domain of Federal authority, this Court will look into the operation and effect of the statute to discern its purpose."

The same doctrine is vigorously asserted and most beneficially applied in aid of right by Mr. Justice Matthews, speaking for the Court in the well known case of Yick Wo and Wo Lee vs. Hopkins (118 U. S. 356).

Applying the principle thus established to the case at bar, it is difficult to escape the conclusion that in preparing the law, so as to cover sales by sample, it was intended, specifically, "by roundabout means," to reach and discriminate against the non-resident vendor. It will be noticed that sales by sample are not mentioned in the present statute. They were mentioned specifically in that portion of the Code (Vol. I, Art. 56, Secs. 37 to 40), which is headed "Non-resident Traders," and which still remains unrepealed, on the statute book, although declared unconstitutional and void by this Court, in Ward vs. Maryland (12 Wall., 418). The statute involved in this case coexisted with the other, both being part of the original Code of 1860. Both are given at length in the report of Ward's case (12 Wall., 419, 420), the present law being headed simply, "Traders." It remained altogether unmodified until 1880, ten years after the decision in Ward's case, when the Act of that year (ch. 349) was passed. This amended it in no particular pertinent to the present controversy, except by providing, (sec. 56, Record, p. 7) for the first time, that where any applicant for a license "lives out of the State," his agent may apply for him and make the prescribed affidavit in his stead. In this indirect way, and in this only, the original provisions of the Code intended for and applicable to home traders only and not non-residents, are

made to apply to the latter also. That its actual purpose and intent were to get the benefit of the exclusive policy defeated by the decision in Ward's case, and yet disguise that policy under cover of a pretended and ostensible equality among vendors of all sorts, it is believed that a moment's consideration will demonstrate.

As to the spirit in which the entire legislation referred was conceived—for it was all conceived together—it is impossible to make any mistake. The sections of the Code disposed of in Ward's case render it undeniable, that the avowed policy and purpose of the Maryland laws were to discriminate against all traders but "permanent residents" of the State, and to prevent them by such discrimination, from selling goods therein by "sample, card, &c."

There is no ground for belief or for the suggestion, that this purpose had ceased to exist when the Act of 1880 was passed, although it had been thwarted, for the time, by the interposition of this Court. The non-repeal of the obnoxious statute thus discredited here, is a sufficient indication of the continuing *animus*. Now, as we have said, the Act of 1880 does not allude, in words, to sales by sample. It simply forbids sales generally, without license first obtained. As matter of notorious fact, the local trader, of course, does not sell by sample. His goods are on far better and more attractive exhibition at his warehouse. But, even if he chooses to sell by sample, he requires no special license for that privilege. The one license covers all his sales of all sorts. Necessarily therefore, although sales by sample, made by non-residents, stand on the same footing, ostensibly, as to license, with those by residents, neither class of vendors being named, yet as the provisions of the statute tacitly cover non-residents, and none but they make sales by sample, it is quite plain that those provisions are aimed exclusively at non-residents, and were intended to discriminate against them "by roundabout means," without disclosing or confessing the discriminating purpose. It would not have done to leave the law subject to a construction that would exclude non-residents from the privilege of taking out a

license, and then punish them for selling without one. The next best thing, in the interest of the local trader, was a contrivance to let the non-resident in, with apparent equality, through his agent, and yet burden him with an imposition, practically though not confessedly confined to him, and actually, though not ostensibly, discriminating against him.

S. T. WALLIS,
HENRY D. LONEY,
For Plaintiff in Error.

MAR 31 1886
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885, No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

STATE OF MARYLAND, DEFENDANT IN ERROR.

BRIEF

ON THE PART OF

THE STATE OF MARYLAND.

CHAS. B. ROBERTS,
Attorney-General of Maryland.
CHAS. J. M. GWINN,
Of Counsel for State of Maryland,
Defendant in Error.

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GEORGE W. CORSON, PLAINTIFF IN ERROR,

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STATE OF MARYLAND, DEFENDANT IN ERROR.

BRIEF ON THE PART OF THE STATE OF MARYLAND.

The plaintiff in error was indicted in the Criminal Court of Baltimore.

The indictment contained two counts.

The second count charged that the plaintiff in error, being a resident of the city of New York, in the State of New York, and the agent of a certain Rosewell, Skeel & Co., a firm in New York city, did, by the authority of that firm, on a day named in said count, sell in the city of Baltimore, by sample, to one Kenney, thirty packages of tea, the property of said Rosewell, Skeel & Co., the members of which firm were residents and citizens of said city and State of New York; which said packages of tea, so sold, were then stored in the warehouse of the said firm in said city of New York, without first taking out a license therefor; neither the said plaintiff in error, nor the said Rosewell,

Skeel & Co., having any store, or place of business, temporary, or permanent, or any stock in trade, other than samples of tea, in said State of Maryland; and neither the said plaintiff in error, nor the said Rosewell, Skeel & Co., being the growers, makers or manufacturers of said thirty packages of tea.

The count further charged that neither the plaintiff in error, nor the said Rosewell, Skeel & Co., intended to keep any stock in the said city of Baltimore, or to be engaged in any trade, or business, in said city or State, otherwise than by selling by samples as aforesaid. That neither had any principal season of sale in said city, or State, but that said Rosewell, Skeel & Co. had its only place of business in the city of New York, where its stock of trade was and has since been kept, *and where their goods, on being sold, were then, and since have been, shipped directly to purchasers in the State of Maryland*, and other parts of the United States.

The first count charged an offer to sell the said packages of tea. In other respects its allegations are identical with those contained in the second count.

This indictment was, as is shown by its text, a prosecution for the violation of the requirements of Sections 41 and 42 of Article 56 of the Code of Public General Laws of Maryland, as the same were amended by the Maryland Act of 1880, chapter 349.

The plaintiff in error demurred to the indictment, and thus admitted the material and sufficient facts which were alleged in the indictment. *Brooke vs. Widdicombe*, 39 Md. 400, 401. His demurrer being overruled, and he having waived his right to plead over, judgment was entered against him.

The plaintiff in error thereupon applied to the said Criminal Court of Baltimore to have the Record removed

to the Court of Appeals of Maryland as upon writ of error, and designated the questions of law which he alleged that the said Criminal Court had erroneously decided when it overruled his demurrer.

The points thus designated, and which are now under review, were substantially as follows:

He claimed that the Criminal Court had, in overruling his demurrer, erroneously decided, as follows, namely:

1. That Sections 41 to 56, both inclusive, of Article 56, of the Code of Public General Laws of Maryland, as amended by the Act of 1880, Chapter 349, were applicable to the facts set forth in the indictment; and that the plaintiff in error had violated said provisions of the Code by not taking out a license.

2. That said sections of the Code of Public General Laws of Maryland, as so amended, were not in violation of Article 4, Section 2, sub-Section 1 of the Constitution of the United States, in which it was declared that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

3. That said sections of the Code of the Public General Laws of Maryland, so amended, were not in violation of Article 1, Section 8, sub-Section 3 of the Constitution of the United States, which declared that "the Congress shall have power to regulate commerce * * * * among the several States."

4. That a citizen and resident of the State of New York, carrying on business in said State, having his stock in trade in said State, and not being the grower, maker or manufacturer of the articles sold by him, and having no store or place of business, temporary or per-

manent, in the State of Maryland, and not intending or expecting to have any stock in trade in said last named State, or to be engaged in any trade, or business, in said State, otherwise than in selling by sample, and having no principal season of sale in said State, but whose only place of business was in the city of New York, in the State of New York, where his stock in trade was kept, *and whence his goods, on being sold, were shipped directly to purchasers in the State of Maryland, and other States of the Union*, had no right or authority to sell, by sample, in Maryland, goods so kept by him in the State of New York, without first procuring a license as provided by Sections 41 to 56, both included, of Article 56 of the Code of Public General Laws of Maryland, as amended by the Maryland Act of 1880, chapter 349.

5. That the State of Maryland was empowered to impose taxation upon goods which were out of the State of Maryland and were in other States of the United States.

6. That the State of Maryland had the right to require a non-resident of the State of Maryland to procure a license before he could offer to sell, or sell, goods which were not in the State of Maryland, and to measure the amount of said license by the stock in trade generally kept on hand by such non-resident, in the principal season of sale, in the State in which said non-resident of Maryland might actually reside; though such stock of trade was not in Maryland, and was not intended to be brought to Maryland; and though the effect of such legislation was to impose on such non-resident, and to require him to pay a tax on goods which were not within the jurisdiction of the State of Maryland, nor were answerable to its laws, nor were under their protection.

7. That a citizen of New York could not personally, or by his agent, lawfully make a contract in Maryland for the sale of goods, then being in New York, without a license therefor from said State of Maryland.

8. That the State of Maryland might lawfully impose a tax on goods, imported from the State of New York into the said State of Maryland, notwithstanding the prohibition of Article 1, Section 9, sub-Section 5, of the Constitution of the United States.

9. That sections 41 to 56, both included, of Article 56 of the Code of Public General Laws of Maryland were applicable to cases, other than those of traders having, or intending to have, a place of business, and a stock of goods for sale, in the State of Maryland.

The Court of Appeals of Maryland affirmed the judgment of the Criminal Court of Baltimore, *Corson vs. State*, 57 Md. 251, and the rulings of the Criminal Court of Baltimore, which were assigned as errors of that Court in the Court of Appeals of Maryland, are now again assigned in this Court as errors of the Court of Appeals of Maryland.

The questions raised by such assignment of errors, again relied on in this case, can be most conveniently discussed in an argument directed to the consideration of the second count of the indictment. Whatever is true in relation to that count, is true also as to the first count of the indictment.

I.

Sections 41 to 56 of Article 56 of the Code of Public General Laws of Maryland, as the same were amended by the Maryland Act of 1880, chapter 349, are broad and general in their terms, and are applicable to the facts set forth in the indictment.

It is, in general, within the constitutional power of every State to tax occupations, within the control of a State, by requiring persons who wish to pursue them, to obtain, before doing so, a license from certain designated officers.

Nathan vs. Louisiana, 8 Howard 80-82; *Welton vs. Missouri*, 91 U. S. 278. Such license is a tax. No employment, thus under State control, is absolutely exempt from the liability to be so taxed. "The necessities of the government may require that the lowest employment, as well as the most lucrative, shall contribute to its support; and, if any is exempted, motives of policy will govern the discrimination." Cooley on Taxation, 1st Ed., 385; Burroughs on Taxation, section 77; License Tax Cases, 5 Wallace, 472, 473, 474.

The selling of goods by sample within a particular State is conducting a *business* in such State. As a business, it is subject to taxation, unless there be some constitutional reason exempting it from the burden. Cooley on Taxation, 1st Ed., 384; *McCulloch vs. Maryland*, 4 Wheat., 428, 429; *State Tax on Foreign Held Bonds*, 15 Wallace, 319. *Shepherd vs. Sumpter Co. Commissioners*, 59 Geo., 535.

II.

The provisions of the Maryland Code, which are in controversy in this case, as amended by the Maryland Act of 1880, chapter 349, were not in violation of Article 4, Section 2, sub-section 1, of the Constitution of the United States, because their provisions apply equally to citizens of the State of Maryland and to citizens of the other several States. *Machine Co. vs. Gage*, 100 U. S., page 679.

III.

Sections 41 to 56, of Article 56 of the Maryland Code, as amended by the Maryland Act of 1880, chapter 349, are not attempts to interfere with the exclusive power of Congress to regulate commerce among the several States, though they are applicable to the facts which are stated in the indictment in this case, and admitted by the demurrer.

The vendor, in this case, appropriated the specific quantities of teas sold for the benefit of the vendee, and engaged that such specific quantities should be shipped to him. The vendee assented to the appropriation made by the vendor and upon his terms. The property in the goods, therefore, passed to the vendee. Chitty on Contracts, 11 Eng. Ed., 1881, 357; *Gillet vs. Hill*, 2 Cromp. & Mees. Rep., margin, page 535, 536; *Dickson vs. Yates*, 5 B. & Ad. 313, 27 E. C. L. Rep., Denman, C. J., 90, Parke, J., 92. The Judge last referred to said—"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery." * * * Where there is a sale of goods generally, no property in them passes till delivery, because, until then, the very goods sold are not ascertained; but where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." 27 E. C. L. Rep., 92; *Thompson vs. Baltimore and Ohio Railroad Company*, 28 Md., 405.

In this case it was one of the conditions of the sale, as alleged in the indictment and admitted by the demurrer; that the packages of tea should be shipped by the vendor "directly" to Kenney, the purchaser, in Maryland. There was, therefore, not only a constructive, but also an actual delivery of the property in Maryland. *Magruder vs. Gage*, 33 Md., 348, 349; *Kirby vs. Jones*, 44 Md., 406, 407.

Under such circumstances the effect of the sale to Kenney of the particular tea, and of its shipment to him as a purchaser, was to bring the property thus sold and shipped,

within the jurisdiction of the State of Maryland; to incorporate and intermix it with the mass of property in the State; to deprive it of its distinctive character as an import, and to subject it to the taxing power of that State. *Howell vs. State*, 3 Gill, 23; *Providence Bank vs. Billings*, 4 Peters, 564; *Brown vs. Maryland*, 12 Wheat, 441, 442; *Pervear vs. Comm.*, 5 Wallace, 479; *Waring vs. Mayor*, 8 Wallace, 122, 123; *Woodruff vs. Parham*, 8 Wallace, 139, 140.

It has been decided that where the business, or occupation, in which a license is required by law, consists in the sale of goods, the requirement of a license tax to authorize the pursuit of such business is in effect a tax upon the goods which are sold under such license. *Welton vs. Missouri*, 91 U. S. 278; *Cook vs. Pennsylvania*, 97 U. S. 573; *Machine Co. vs. Gage*, 100 U. S. 678, 679.

It is supposed to follow from the decision thus made, that if particular goods are not, at the moment of sale, within the taxing power of a State, any laws of the State, which require a license to be obtained as a condition precedent to the right to make such sale, do not apply.

Licenses are required to authorize the conduct of business in the *future*. They are intended to apply, not only to sales subsequently made of goods, which formed a part of the property within the State when the licenses were required, but to goods not then in existence, or then situated beyond the limits of the State, which might, during the period of time covered by the required license, become part of the general mass of property within the State.

A license is, according to the language and meaning of the authorities referred to, a means of taxation, which a State may legitimately devise to reach moveable properties, within the scope of the license, which were in such

State when the license was granted, or which may be, during the term for which the license was granted, and partly by the instrumentality of a sale effected under such license, added to the mass of taxable property within such State. If the moveable properties, to which such license is applicable, are not, when they are dealt in, within the limits of the State which prescribes a license as a condition precedent to their sale, and are not brought into the limits of such State by the transfer effected by such sale, and are not intended to be, it might be well argued that such moveable properties were not within the taxing jurisdiction of such State. But when they are dealt in with the purpose of transferring the property in them to an owner in such State, and of bringing them by such sale, into such State, as articles of trade, or use, within such State, the object of such dealing is to intermingle such moveable properties with the géneral mass of property in such State,—the effect is to subject them to taxation in such State, and the provisions of the license laws of such State are as applicable to such properties, as they are to properties not in existence even when a license was granted, but which are subsequently produced in, or brought into such State.

It is plain that the effect of the transaction, which is admitted, in this case, to have taken place, was to incorporate and intermix the property, which was the subject of the sale, with the mass of property in the State of Maryland and to subject it to the taxing power of that State. *Appeal Tax Court vs. Patterson*, 50 Md. 369, 371. A license to sell such goods was, therefore, fitly prescribed as one of the means of exercising the taxing power of the State.

It would, therefore, appear that the particular sections referred to of the Maryland Code, as amended, and as applicable to the admitted facts of the case, are not in conflict with any power of Congress to regulate commerce among the several States. *Ward vs. State*, 31 Md. 283–292.

There are plain reasons why persons, who sell goods by sample, in a State, should be required to pay a license tax for the privilege. They need neither warehouse, nor office, nor, if they act as agents for persons, out of the State, need they have any stock of goods within the State where they make such sales. They pursue their occupation by going from door to door, and compete with resident traders, who are subjected to the burdens of office rent and warehouse rent, and of local taxation upon their stocks of goods. The imposition of a license tax, therefore, upon persons selling goods by sample in a State is a measure of exact justice, because it tends to place such vendors upon a footing with those residents of the State who are engaged in the business of selling the same description of goods. *Woodruff vs. Parham*, 8 Wallace, 137. *Morrill vs. State*, 38 Wisc, 428. *Ward vs. Maryland*, 12 Wallace, 429, 430.

The standard of charges prescribed in Maryland, by sections 43 to 45, both included, of article 56, of the Maryland Code, as now existing, is not inapplicable to such a case. The amount of goods, which the person selling by sample has power to control for the purposes of such sales, at the season, or in the year, in which such sales are expected to be made, is the proper standard of the amount of license fee to be paid.

IV.

The Court of Appeals of Maryland did not, it is respectfully submitted, make the ruling, when it affirmed the overruling of the demurrer of the plaintiff in error, which is assigned as its determination. It decided that a citizen and resident of the State of New York, selling goods, then stored in the city of New York, by sample, in Maryland, to a purchaser in Maryland, and engaging to ship the goods so sold to the purchaser in Maryland, contracted to sell and deliver such goods in Maryland, and, in this manner, to bring the goods themselves within the taxing jurisdiction

of that State; and might therefore properly be required to obtain a license before so doing.

V.

It is submitted also that the ruling, of which the plaintiff in error complains, was not made by the Court of Appeals of Maryland when it affirmed the overruling of his demurrer. That Court did not decide that the State of Maryland was authorized and empowered to impose taxes upon goods out of the State of Maryland, and in another State, or in other States. It decided only that a person who sold by sample, in Maryland, to a resident of that State, goods stored in another State, under a contract, made in Maryland, which provided that the goods should be shipped by the vendor to the purchaser in Maryland, must be deemed to have undertaken to deliver said goods in Maryland, and to be in the same position, so far as the license laws of the State are concerned, as a person who had made a similar contract in relation to like goods under his control within this State.

VI.

The Court of Appeals of Maryland did not determine by its ruling the amount of the license, which the plaintiff in error ought to have paid. It might properly have determined that as the plaintiff in error had entered the market in Baltimore city for the purpose of making sales of goods, he was liable to the same extent as a trader resident in that city—that is to say, that his license ought to have been proportioned to the stock of goods which he or his principal kept on hand, and with which he claimed the right to supply the Baltimore market. If he or his principal had no special season of sales, then the largest amount of stock kept on hand for purposes of sale at any period of the year, would seem to have been the proper measure of the amount of the license to sell goods within this State, which such person ought to have paid.

VII.

The Court of Appeals of Maryland did not determine by its ruling that a citizen of New York might not, personally, or by his agent, lawfully make a contract in Maryland for the sale of goods then stored in New York without a license from the State of Maryland. It decided, in this particular case, only that a citizen of New York, who came to Maryland, and there sold goods, by sample, engaging that the goods thus sold should be shipped to the purchaser, contracted, in effect, to make delivery of the goods so sold in Maryland, and brought the transaction, in which he was concerned, directly within the legitimate and constitutional scope of the license laws of this State.

It is respectfully submitted that the license charge upon any calling, or occupation, in a State, may be maintained where the direct and immediate purpose of such calling, or occupation, is the making of contracts, under which the articles agreed to be sold, or bought, are to be brought within the jurisdiction of this State, and subjected to its taxing power.

VIII.

The sale of the particular goods was made in Maryland. Under the terms of the sale the goods sold were brought into that State, and intermixed with the general mass of property in that State. The license charge imposed was not a tax, or duty, laid on articles exported from the State of New York, but a tax on such goods when brought within the jurisdiction of the State of Maryland. The charge imposed, therefore, was not a violation of Article 1, Section 9, sub-Section 5 of the Constitution of the United States. See especially *Woodruff vs. Parham*, 8 Wallace, 136, 139.

IX.

The Court of Appeals of Maryland rightly decided that Sections 41 to 56, both included, of Article 56 of the Code of Public General Laws of Maryland, as amended by the Maryland Act of 1880, Chapter 349, were applicable to other cases than traders, having, or intending to have, a fixed place of business, and a stock of goods on hand in readiness for sale in the State of Maryland.

It cannot be supposed that the provisions of law, which are referred to, were intended to affect only those traders, who openly maintained a particular place of business, and sold only stocks of goods, which were in their actual possession upon their premises. It is not possible to imagine that it was the purpose of the General Assembly to subject such open traders to the necessity of obtaining a license, before they could sell goods, and to leave those, who had no fixed place of business, and no stock of goods on hand, free to contract for making sales and deliveries of all goods, within this State, without a license, if they could find a place within this State in which to contract, and could obtain sufficient control over any stock of goods outside of he State, to obtain the power to sell them by sample. *Woodruff vs. Parham*, 8 Wallace, 137.

CHAS. B. ROBERTS,
Att'y-General of Maryland.

CHAS. J. M. GWINN,
Of Counsel for State of Maryland,
Defendant in Error.

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IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1885.

No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND, DEFENDANT IN ERROR.

ADDITIONAL BRIEF

Of the Defendant in Error in the cause aforesaid upon the re-argument of said cause permitted by the Court in connection with the case of Robbins vs. Taxing District of Shelby County, Tennessee, October Term, 1886, No. 816.

CHAS. B. ROBERTS,
Attorney General of Maryland.

CHAS. J. M. GWINN,
Of counsel for State of Maryland, Defendant in Error.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

IN THE

Supreme Court of the U. S.

October Term, 1885.

No. 211.

GEORGE W. CORSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND, DEFENDANT IN ERROR.

ADDITIONAL BRIEF

OF THE DEFENDANT IN ERROR IN THE CAUSE AFORESAID UPON THE RE-ARGUMENT OF THE SAID CAUSE PERMITTED BY THE COURT IN CONNECTION WITH THE CASE OF ROBBINS *vs.* TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE, OCTOBER TERM, 1886, No. 816.

The subject of licenses to traders in Maryland is regulated by Article 56, vol. I, of the Code of 1860, of that State, as amended by the Maryland Act of 1880, chap. 349.

The provisions of the Code, thus amended, under which the proceedings in this case have arisen, are sufficiently set forth in the opinion of the Court of Appeals of Maryland contained in the

Record. Record, p. 7. Case reported as *Corson vs. State*, in 57 Md., 264, 265.

The Plaintiff in Error, being a resident and citizen of the State of New York, and the agent of a firm made up of other residents and citizens of that State, was indicted in the Criminal Court of Baltimore, in Maryland, for offering to sell, and also for selling, by sample, in the city of Baltimore, to one Cornelius D. Kenney, certain packages of tea, then stored in the city of New York, the property of the residents and citizens of the State of New York, for whom he was agent, without having procured a license to make such offer of sale, or sale, from the State of Maryland. Record, pp. 1, 2.

It was averred, in effect, in such indictment that packages of tea, so sold by sample in Maryland, were afterwards shipped by the said firm in New York directly to the purchasers of said teas in Maryland. Record, p. 2, second count.

The Plaintiff in Error demurred to the indictment (Record, p. 3), and thus admitted the matters of fact alleged therein.

The demurrer of the Plaintiff in Error having been overruled, and his right to plead over being waived, judgment was entered against him for the proper fine by the Criminal Court of Baltimore. Thereupon he removed the case, by way of writ of error, to the Court of Appeals of Maryland. Record, p. 3.

The judgment of the Criminal Court of Baltimore was affirmed by the Court of Appeals of Maryland. Record, pp. 5–8. And thereupon the case was brought, by writ of error, into this Court.

The Court of Appeals of Maryland decided, in this cause, that the provisions of the Maryland Code, amended by the

Maryland Act of 1880, chap. 349, under which the particular indictment was found, required that all persons, whether residents, or non-residents of the State of Maryland, before offering to sell, or selling, by sample, in that State, packages of tea or other merchandise stored within the limits of any other State, should obtain the license so to do from the State of Maryland, which was required by Art. 56 of the Code of that State, as amended by the Act of 1880, chap. 349. Record, pp. 7, 8; 57 Md., 265, 266, 267.

The construction thus given by the Court of Appeals of Maryland to the *scope* of the license laws of Maryland, which are in controversy here, is authoritative in this Court.

Christy vs. Pridgeon, 4 Wall., 196, 203.
Aicardi vs. State, 19 Wall., 635, 639.
Burgess vs. Seligman, 107 U. S., 20, 33, 34.
Flash vs. Conn, 109 U. S., 371, 379.

The question remaining for determination is,—whether the requirement of the laws of Maryland that all persons, whether resident of Maryland, or of any other State, should obtain a license from the State of Maryland before offering for sale, or selling, by sample, in that State, merchandise, which at the time of such offer, or sale, was stored within the limits of another State, is in contravention of any provision or requirement of the Constitution of the United States?

1. The Maryland laws in question accorded equal privileges and immunities to all persons whether resident or non-resident of that State. Therefore no question arises in this case under Article 4, sec. 2, clause 1, of the Constitution of the United States, or under section 1977 of the Revised Statutes of the United States.

Woodruff vs. Parham, 8 Wall., 123, 140.
Hinson vs. Lott, Ibid., 148, 153.
Osborne vs. Mobile, 16 Wall., 481, 482.
Machine Co. vs. Gage, 100 U. S., 676, 679.

2. The laws in question did not impose a tax, or duty, on articles *exported* from any State, and, therefore, were not in conflict with sub-section 5, of section 9, of Article 1, of the Constitution of the United States.

Woodruff vs. Parham, 8 Wall., 128.

3. If the provisions of the Maryland laws, as construed by the Court of Appeals, were a constitutional and proper exercise of the taxing powers of that State, they did not improperly abridge the privileges or immunities of citizens of the United States, or deprive any person of his property without due process of law, and were, therefore, not in contravention of section 1 of Article 14, of the Constitution of the United States.

Paul vs. Virginia, 8 Wall., 168, 180.

4. The provisions in question were a proper exercise of the taxing power of the State of Maryland over a subject matter within its taxing jurisdiction, and were not regulations of commerce among the several States, inconsistent with the provisions of clause 3 of section 8 of Article 1 of the Constitution of the United States.

We think that the first, second and third propositions, above stated, require no argument, except such as is supplied by the authorities cited. We will consider the fourth proposition. It involves all the questions in controversy.

The general power of the State to impose taxes, in the form of licenses, upon all *occupations* pursued within its limits, cannot be doubted, if such power is exercised in subordination to the requirements of the Federal Constitution.

License Tax Cases, 5 Wall., 471.
Nathan vs. Louisiana, 8 Howard, 80.
Welton vs. State of Missouri, 91 U. S., 278.

The offering for sale, or sale, of merchandise by sample is a common occupation. When such offer for sale, or sale, is made by any person within a State, to another person in the same State, the occupation is a part of the internal commerce of such State. The laws of the State may impose taxes, in the form of licenses, upon such occupations, if such taxes do not trench upon Federal authority, or violate any right recognised, or secured, by the Constitution of the United States.

Kirtland vs. Hotchkiss, 100 U. S., 491, 498.

It is argued, on the part of the Plaintiff in Error, that the Maryland Laws in question, as construed by the Maryland Court of Appeals, imposed a tax upon property, situated in the State of New York, and not within the taxing jurisdiction of Maryland, and so violated the rights of the New York firm of which the Plaintiff in Error was the agent.

When a State requires by law that a person shall obtain a license before offering to sell, or making sale, of merchandise in such State, the fee paid for such license has been held to be a tax. If the merchandise, offered for sale by the licensee, is not sold, the tax imposed by law certainly does not fall upon such merchandise, but rests as a personal tax only, upon the holder of the license. If the merchandise is sold, by sample, or otherwise, under such license, then such license is maintainable as *a tax upon sales made within the State*,—a method of taxation recognized as valid in the case of *Woodruff vs. Parham*, 8 Wall., 123, 140. It is maintainable also as a tax upon business done in the State; *Nathan vs. Louisiana*, 8 Howard 80; *Slack vs. Tucker & Co.*, 23 Wall., 330; or upon the doctrine that the proceeds of sales, made in a State, form a part of the taxable wealth of that State.

People vs. Commissioners, 104 U. S., 468.

The judgment of the Court of Appeals of Maryland may be upheld upon other grounds.

It is evident that the Plaintiff in Error was a wholesale dealer in Maryland. It is true that he sold by sample, and did not keep the merchandise, which he thus sold in any store in Maryland, but the sales, which he thus made of such merchandize, were, nevertheless, *his sales.*

Slack vs. Tucker & Co., 23 Wall., 329.

The sales, so made by the Plaintiff in Error, operated as a transfer of the ownership and right of property in the articles sold to the purchaser, as directly as if the goods themselves had been sold in bulk.

2 Addison on Contracts, Am. Ed., 1883, bottom pages, 444, 445.

Slack vs. Tucker & Co., 23 Wall., 329.

Such method of sale, by sample, is of course applicable equally to sales of merchandise, situated within the State, in which the contract of sale is made, and to sales of merchandise situated in a different State from that in which such contract of sale is made. In both cases the effect of such sale by sample operates as directly as a transfer of the ownership and right of property in the goods so sold, as if the goods themselves had been sold in bulk.

The *demurrer* in this case admits the sale in the city of Baltimore to Cornelius D. Kenney of thirty packages of tea,—the property of the New York firm, of which the Plaintiff in Error was agent,—then stored in the city of New York in the warehouse of the New York firm.

The sale by sample, therefore, by the Plaintiff in Error in the city of Baltimore to Cornelius D. Kenney, of the said thirty packages of tea, immediately vested the ownership and right of property in the said packages of tea in the said Kenney.

Chitty on Contracts, 11th Eng. Ed., 1881, p. 357, 11th Am. Ed., Vol. 1, p. 518.
Gillet vs. Hill, 2 Cromp. & Mees., m. p. 535, 536.
Dickson vs. Yates, 7 B. & Ad., 313; 27 E. C. L. Rep., 90, 92.

The ownership and right of property in said packages, so vested in said Kenney, the purchaser, in Maryland, acquired, forthwith, a Maryland *situs* under the familiar rule that the domicil of the owner of personal property is considered to be its taxable *situs*, and became liable to the tax practically imposed upon them by the license to sell, issued by the State of Maryland, under which that ownership and right of property had been obtained.

It did not in the least matter, that the said packages of tea, when sold by sample, made a part of the general mass of property in the State of New York. The ownership and right of property in the same packages, when so sold, became also property having a *situs* in Maryland; *Coe vs. Errol*, 116 U. S., 524; and, as property in Maryland, were subject to the Maryland tax imposed by that license, which had been the means used to change or duplicate, even, the taxable *situs* of the particular property. *See case last cited, p.* 524.

This taxable *situs* in Maryland, founded on the *ownership and right of property* in the particular packages of tea, was sufficient in itself to maintain the validity of the Maryland license tax under the cases of *Welton vs. Missouri*, 91 U. S., 278; *Cook vs. Pennsylvania*, 97 U. S., 573; *Machine Co. vs. Gage*. 100 U. S., 676, 678, 679. Under the Maryland Act of 1880, chap. 122, sub-sec. 2, a taxing law approved March 30th, 1880, and in force when the particular sale by sample was made, the enumeration of particular descriptions of property, subject to valuation and assessment in Maryland, is followed by these general words,—"and all other property, of every kind, nature and description, within this State,

shall be valued to the respective owners thereof in the manner prescribed by the laws of this State, and shall be assessed and taxed as the property of such respective owners, according to such prescribed methods of valuation, except as provided in the next ensuing section."

The exceptions referred to do not, in any wise, affect the question at issue.

The same broad provision had been previously made by the Maryland Act of 1876, chap. 260, section 2, *last clause*, and repeated in the Maryland Act of 1878, chap. 413, sec. 2, *last clause*. In the case of *Appeal Tax Court vs. Patterson*, 50 Md., 367, decided in 1878, a case the judgment in which was afterwards affirmed in this Court, under the name of *Bonaparte vs. Tax Court*, 104 U. S. 592, the doctrine that "*mobilia sequuntur personam*" was fully recognized. 50 Md., 368, 369, 370, 371. The rule is, indeed, a maxim of Roman, English and American law, except where it has been modified by statute, Broom's Maxims, 5th Eng. ed., 522, and must prevail, unless, as said in *Green vs. Van Buskirk*, 7 Wall., 150, "the purposes of justice require that the actual *situs* of the thing should be examined."

When the actual *situs* of the merchandise referred to in this case is examined, the purposes of justice, the interests of the people of the respective States, and the objects of government, would seem to require, if such conclusion can be reached by any fair interpretation, that no person, whether resident, or non-resident, of a State, should be allowed to sell, by sample, in such State, merchandise stored in another State, without a license, when a resident, or non-resident of such State could not sell goods, *actually stored therein*, by sample, or in bulk, without a license.

However this may be we insist that under the sale made by

sample in Maryland of the thirty packages of tea to Kenney, the ownership and right of property in said teas followed the person of Kenney, and acquired a taxable *situs* in Maryland.

Wiggins Ferry Co. vs. East St. Louis, 107 U. S., 365, 373, 375.

Machine Co. vs. Gage, 100 U. S., 678, 679.

Again. It is averred in the indictment in this case and admitted by the demurrer, that the firm in the city of New York, of which the Plaintiff in Error was the agent, had its only place of business in said city, where its stock in trade was, and that their goods, on being sold, were *then and there shipped directly to purchasers in Maryland*, and other parts of the United States.

It appears, therefore, from the Record, that there was not only a constructive, but also an actual delivery made of the particular thirty packages of tea, in the State of Maryland, under the contract made by the Plaintiff in Error with Kenney.

The effect of the sale to Kenney of the particular tea, under the admission made by the demurrer, was to cause the said packages of tea, *on the making of the said sale*, to be shipped directly to the said Kenney. When these packages were thus actually started, as the demurrer admits, in the course of transportation to the purchaser, they ceased to be a part of the mass of property in the State of New York (*Coe vs. Errol*, 116 U. S., 525), and on their arrival in Baltimore, or Maryland, became incorporated and intermixed with the mass of property in Maryland, and subject to taxation by that State.

Brown vs. Maryland, 12 Wheat., 441, 442.
Pervear vs. Comm., 5 Wall., 479.
Waring vs. Mayor, 8 Wall., 122, 123.
Woodruff vs. Parham, 8 Wall., 139, 140.

The license, therefore, which the Plaintiff in Error was required by the laws of Maryland to obtain, before offering to sell, or selling, the particular packages of teas, did not operate as a tax upon property situated within the jurisdiction of the State of New York, but upon property which became, by sales under that license, intermingled with the mass of property in the State of Maryland.

The requirement of such a license was not an attempt to regulate commerce between States, but the exercise of a proper power of regulating domestic sales within the limits of a State.

Osborne vs. Mobile, 16 Wall., 482.

The General Assembly of Maryland provided, by the Act of 1886, chap. 460, approved April 22d, 1886, "that from and after the passage of this Act it shall not be necessary for non-resident travelling salesmen, or sample merchants, or the representatives of foreign mercantile, or manufacturing firms, or corporations, as such, to take out a license in order to make sales to *licensed* merchants or solicit orders from *licensed* merchants in this State."

It will be seen that this statute is prospective only in its operation; and that, while it does not require those to whom it refers to take out a license, in order to make sales to, or solicit orders from, *licensed* merchants in the State of Maryland, it, in effect, requires them to take out such license before soliciting orders from, or making sales to, others than licensed merchants in Maryland.

The statute in question does not in any manner affect the case now before this Court.

The observations, heretofore made, lead to the following conclusions:

1. The Plaintiff in Error made and completed a sale of merchandise *in Maryland.*

2. In so doing he pursued an occupation in that State, for which a license was required equally from those citizens, resident, or non resident, of that State, who chose to pursue it.

3. He sold, *in Maryland*, a right of ownership and property which were taxable under the laws of that State.

4. The provisions of Maryland law, which required him to obtain a license from that State before making such sales, were not attempts to regulate commerce between the States, but were, on the contrary, rules prescribed by the State for the regulation of the sale of taxable merchandise within its own territory.

5. The amount of money required by the State as the price of such license is not a Federal question. It may be said, however, that the price of a license to any dealer, acting for himself, or representing a principal, may, with great justice, be measured, in any License Act, by the amount of merchandise in the possession of such dealer, or principal; since the person, so licensed, could, if he pleased, dispose of all such merchandise in the locality in which his license authorized him to make sales of merchandise.

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CHAS. J. M. GWINN,
Of Counsel for the State of Maryland, Defendant in Error.

September 23*d*, 1886.

The re-argument is submitted on the part of the State of Maryland, Defendant in Error, on this Brief.

CHAS. B. ROBERTS,
Atty. General of Maryland, for Defendant in Error.

See note on fresh hdp.

NOTE.—We beg leave to subjoin the following, in the form of a *note* to the text and authorities set forth in the last paragraph on page 4, and in the first paragraph on page 5 of the foregoing brief.

It cannot be true that the validity of a State law, requiring a person, who is not the owner, or manufacturer of particular property, to obtain a license before pursuing the occupation of selling such property, in that State, depends upon the question whether such property is, *at the time of its sale*, within the territory of the State requiring such license.

A State may certainly require that a person should obtain a license before he pursues the occupation of selling, for others, in such State, shares of stock in a corporation chartered by a different State, although such shares may stand, at the time of such sale, in the name of a resident of such different State.

A State may certainly require that a person should obtain a license before he pursues the business of selling, for others, in such State, lands situated in a different State, or States.

Yet in neither of these cases is the property sold, at the time of such sale, within the limits of the State requiring such license.

The validity of the operation of a State Law requiring a license to pursue the occupation of selling, or offering for sale, property within such State, would seem to depend upon a rule which may be stated with precision. If the property dealt in is property which, if it had been located within the State, requiring such license, when such sale was made, would have been liable to taxation by such State, then the business or occupation of selling it, or offering it for sale, within such State, is taxable by the State in which such sale, or offer of sale is made.

The rule thus stated is in harmony with the adjudications of this Court, and would seem to afford the means of solving the problems presented by such cases as the present.

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